

(27,599)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 298.

PHILADELPHIA AND READING RAILWAY COMPANY,
PETITIONER,

vs.

MARIE E. POLK.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF PENNSYLVANIA.

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C. P. No. 5, September Term, 1918.

No. 1919.

Docket Entries.

Michael D. Hayes, 8/27/19.

1919.

Geo. G. Parry.

MARIE E. POLK, Claimant.

vs.

PHILA. & READING RAILWAY CO., Deft., Philadelphia & Reading
Railway Co., Insurance Carrier.

Oct. 11, 1918. Appeal of Phila. & Reading Railway Co. from decision of the Workmen's Compensation Board made Oct. 4, 1918, filed.

Ex Die. Exceptions filed.

Oct. 11, 1918. Certiorari to Workmen's Compensation Board.

Jan. 4, 1919. Record returned, opened and filed.

Aug. 14, 1919. The appeal of the Defendant is dismissed and judgment is directed to be entered in accordance with the award of the Referee and the Workmen's Compensation Board.

Aug. 27, 1919. Certiorari from Supreme Court as of No. 135, Jan. Term, 1920, brought into office.

Certified from the record this 29th day of August, A. D. 1919.

[SEAL.]

R. M. SNYDER,

Pro Prothy.

3 In the Court of Common Pleas No. —, of Philadelphia
County, of September Term, 1918.

No. —.

Bureau of Workmen's Compensation

Department of Labor and Industry.

Claim Petition, No. 5722.

MARIE E. POLK, Claimant,

VS.

PHILADELPHIA AND READING RAILWAY COMPANY, Defendant; Phila-
delphia and Reading Railway Company, Insurance Carrier.

Philadelphia and Reading Railway Company, Appellant, appeals
from the decision of the Workmen's Compensation Board made Oc-
tober, 4, 1918, on the claim above mentioned.

PHILADELPHIA AND READING
RAILWAY COMPANY,

By GEO. ZIEGLER,

Secretary.

COMMONWEALTH OF PENNSYLVANIA,

County of Philadelphia, ss:

George Ziegler on oath says that he is Secretary of Appellant
Company, and that this appeal is not taken for the purpose of delay,
but because the appellant believes that injustice has been done by
the decision appealed from.

GEO. ZIEGLER.

Sworn to and subscribed before me this 10th day of October A. D.
1918.

[SEAL.]

J. V. HARE,
Notary Public.

Commission expires March 1, 1919.

4 In the Court of Common Pleas No. —, of Philadelphia
County, of September Term, 1918.

No. —,

Bureau of Workmen's Compensation,

Claim Petition, No. 5722.

In the Matter of MARIE E. POLK, Claimant,

vs.

PHILADELPHIA AND READING RAILWAY COMPANY, Defendant.

*Exceptions Ex Parte Appellant to the Decision of the Workmen's
Compensation Board.*

1. The Compensation Board erred in reaching the legal conclusion that the claimant was entitled to compensation under the Workmen's Compensation Act of 1915.

2. The Compensation Board erred in failing to reach the conclusion that claimant's decedent and defendant were engaged in interstate commerce at the time decedent was injured.

3. The Compensation Board erred in holding that the defense of interstate commerce carries with it the burden of proof.

4. The Compensation Board erred in holding that the burden of proof was on the defendant to show that decedent was engaged in interstate commerce.

5. The Compensation Board erred in failing to hold that the burden of proof was on the claimant to show that the decedent came within the provision of the Workmen's Compensation Act.

6. The Compensation Board erred in approving and adopting the findings and conclusions of the Referee.

7. The Compensation Board erred in allowing compensation to the claimant.

8. The claimant is not entitled to compensation.

5 9. The award of the Compensation Board is in conflict with the provisions of the Act of Congress of April 22, 1908, and supplements thereto, known as the "Federal Employers' Liability Act" and in violation of Article I, Section 8, of the Constitution of the United States.

10. The award of the Compensation Board is in violation of the 14th Amendment to the Constitution of the United States, in that it deprives this defendant of its property without due process of law.

11. The decision of the Compensation Board is not warranted by law under the evidence in this case.

GEORGE GOWEN PARRY,

*Attorney for Philadelphia and
Reading Railway Company, Appellant.*

Endorsement: No. 1919. C. P. No. 5, Sept. Term, 1918. Marie E. Polk vs. Philadelphia and Reading Railway Company. Defendant's Appeal and Exceptions Ex Parte Appellant to the Decision of the Workmen's Compensation Board. Filed Oct. 11, 1919. George Gowen Parry, Attorney at Law, 415 Reading Terminal, Philadelphia.

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C. P. No. —, September Term, 1918.

No. —,

MARIE E. POLK

VS.

PHILADELPHIA AND READING RAILWAY COMPANY.

To the Prothonotary:

Issue certiorari to the Workmen's Compensation Board in the above entitled case.

GEORGE GOWEN PARRY,

Attorney for Appellant.

October 9, 1918.

Endorsement: No. 1919. C. P. No. 5, Sept. Term, 1918. Marie E. Polk v. Philadelphia and Reading Railway Company. Procipe for Certiorari. Filed Oct. 11, 1918. George Gowen Parry, 415 Reading Terminal.

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A-3929.

Docket Entries.

Proceedings under Claim Petition #5722.

George C. Klauder, Referee, First Compensation District.

MARIE E. POLK

VS.

PHILA. & READING RY. CO.

May 9, 1918.

Claim petition filed.

Counsel for claimant: Michael Hayes, Esq., Philadelphia, Pa.

- May 29, 1918. Notice to defendant of claim petition.
 May 29, 1918. Assignment of claim petition to Referee.
 June 6, 1918. Defendant's answer to claim petition filed.
 Counsel for defendant: George Gowen Parry,
 Esq., Philadelphia, Pa.
 Insurer of defendant: Self Insured.
 June 6, 1918. Notice of hearing with copy of answer served.
 June 11, 1918. Hearing before Referee at Philadelphia.
 July 15, 1918. Referee's award filed.
 Aug. 1, 1918. Appeal by defendant from Referee's findings of
 fact and conclusions of law.
 Aug. 2, 1918. Notice of appeal mailed to appellee.
 Sept. 12, 1918. Hearing before Board at Philadelphia. * * *
 oral argument and briefs submitted and re-
 ferred to Chairman Mackey for opinion.
 Oct. 3, 1918. Opinion by Chairman Mackey, Commissioners
 Scott and Leach concurring, affirming Referee's
 award and dismissing appeal filed.
 Oct. 4, 1918. Notice of decision of the Board with copies of
 same mailed to appellant and appellee.
 7
 Oct. 15, 1918. Appeal and exceptions from decision to the de-
 cision of the Workmen's Compensation Board
 received by Bureau.
 Oct. 15, 1918. Certiorari to Workmen's Compensation Board as
 of September Term 1918, \pm 1919, C. D. \pm 5,
 received.
 January 4, 1919. Certified copy of transcript of record, being pro-
 ceedings under Claim Petition \pm 5722 in the
 Bureau of the Workmen's Compensation Board
 of Pennsylvania, delivered to Prothy C. D. of
 Philadelphia County.

8 *Claim Petition for Compensation by Dependents of Deceased
 Employee.*

(Section 413.)

Workmen's Compensation Bureau, Harrisburg, Pa.

Claim Petition No. 5722.

MARIE E. POLK, Claimant,

vs.

PHILADELPHIA AND READING RAILWAY CO., Defendant.

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To the Workmen's Compensation Board of Pennsylvania:

The claimant respectfully alleges the following facts:

(1) That John M. Polk died on Aug. 29, 1917, as the result of an accident occurring in the course of his employment.

(2) The dependents are as follows:

Name.	Residence.	Relation to deceased.
Marie E. Polk	3545 Janey St.	Widow.
John "	"	Son.
Chas. "	"	"
Geo. "	"	"
Arthur "	"	"

9

Year, month, day of birth.	Nationality.	Language spoken.
June 28, 1886	American	English.
Dec. 8, 1907	"	"
April 12, 1910	"	"
April 12, 1910	"	"
Nov. 29, 1915	"	"

(3) If a claimant is a widower, widow not living with the deceased employe at the date of death, father, mother, brother, sister, step or adopted child or a child to whom the deceased employe stood in loco parentis, state how and to what extent the deceased contributed to his or her support and if the claimant is a widower, also state how and why he is incapable of self support.

If the claimant is a widow or widower state also residence at date of employe's death. 3545 Janey St., Phila., Pa.

(4) There are the following surviving widow, widower or children who are not dependents. (State reason why not dependent.)

(5) By whom was the deceased employed at the time of the accident? Phila. and Reading Railway Co., 12th & Market Sts., Phila.

(6) Where did the accident happen? Clearfield St. Yard, Phila., Pa.

(7) When did the accident happen? August 28, 1917, 11.40 P. M.

(8) What kind of work was the deceased employe doing at the time of the accident? Coupling cars in yard.

(9) Give a full description of the accident and state how it caused the death of the deceased employe. Crushed between cars while coupling them in yard.

(10) Did the deceased employe receive medical, surgical, or hospital services? Episcopal Hospital, Front & Lehigh, Phila.

(11) What were the expenses of the last sickness and burial? \$250.

10 Has the employer paid any part of these, if so, how much?
No.

(12) What were the weekly wages of deceased at time of accident?
\$40.

What was the business of the employer? Railroad company.

What was the occupation of the deceased? Brakeman.

(1) If, but only if, the occupation was seasonal or dependent upon the weather, state:

(a) Total earnings of deceased during the last year \$—.

(13) Was compensation paid to the deceased employe between the date of accident and his death? No.

(14) Did you or the deceased employe serve notice of his injury upon his employer within fourteen days? Defendant employer had actual notice as soon as accident happened.

(15) What other facts are there which you believe important?

(16) State total amount of compensation claimed \$6,428.00.

Wherefore the (claimant, claimants) ask that your Honorable Board shall make an award that the defendant shall pay to (him, her, them) such compensation as may be due (him, her, them) under the alleged facts.

MARIE E. POLK,
Dependent, 3545 Janey St.

Subscribed and sworn to before me, this 25th day of May 1918 at Phila.

EVA VAN ARTSDALEN,
N. P.

My commission expires on 19th day of Feb., 1921.

NOTICE.—This petition may be signed and sworn to by any dependent for himself and all other dependents.

11 Pennsylvania Department of Labor and Industry.
Workmen's Compensation Bureau, Harrisburg, Pa.

Notice to Defendant of Claim Petition.

(Section 413.)

Claim Petition No. 5722.

MARIE E. POLK, Claimant,

VS.

PHILA. & READING RAILWAY, Defendant.

Harrisburg, Pa., May 29, 1918.

To Phila. and Reading Railway Co.,
c/o W. C. Brister, Philadelphia, Pa.:

A claim petition, a copy of which is enclosed herewith has been presented by Marie E. Polk against you to the Workmen's Compensation Board, and has been assigned to G. C. Klauder, Compensation Referee of the 1st District for investigation and determination in accordance with the provisions of the Workmen's Compensation Act of 1915.

We hereby notify you that unless an answer shall within seven days from the date of this notice be filed with the said Referee at his office 1103 North American Bldg. the facts alleged in the petition will be deemed to be admitted and no testimony will be required from the claimant to prove, nor heard in your behalf to deny, such facts.

WORKMEN'S COMPEN-
SATION BUREAU.

Secretary.

NOTE.—The Defendant should file his answer in triplicate with the Referee.

12' *Defendant's Answer to Claim Petition.*

(Section 414.)

Workmen's Compensation Bureau, Harrisburg, Pa.

Claim Petition No. 5722.

MARIE E. POLK, Claimant,

VS.

PHILADELPHIA AND READING RAILWAY COMPANY, Defendant.

June 5, 1918.

In answer to the claim petition No. 5722.

1. The defendant denies the following facts alleged in the claim petition, to wit, the averments of paragraphs 1, 2, 8, 9, 11 and 12.

2. The defendant states the following additional facts not alleged in the claim petition.

3. The defendant denies that he is liable to pay compensation under the facts alleged in the claim petition, for the following reasons, Because claimant's decedent and defendant were engaged in interstate commerce at the time the former was injured.

PHILADELPHIA AND READING
RAILWAY COMPANY,*Defendant,*

By F. W. FLECK,

Chief Clerk Claim Dept.

Address, Reading Terminal, Phila., Pa.

Subscribed and sworn to before me this 5th day of June, 1918.

J. V. HARE,

Notary Public.

[SEAL.]

My commission expires on the 1st day of March, 1919.

- 13 Pennsylvania Department of Labor and Industry,
Workmen's Compensation Bureau, Harrisburg, Pa.
Assignment of Claim Petition to Referee.

(Section 413.)

Claim Petition No. 5722.

MARIE E. POLK, Claimant, 3545 Janney St., Phila.,

—

PHILA. & READING RY., Defendant, Care of W. C. Brister, Phila.
Harrisburg, Pa., May 29, 1918.

To G. C. Klauder, Referee 1st District.

Enclosed find copy of Claim Petition No. 5722 filed by ——— of ——— vs. ———, of ———, which is assigned to you for investigation and determination in accordance with the provisions of the Workmen's Compensation Act of 1915.

WORKMEN'S COMPEN-
SATION BUREAU,

Secretary.

Copy of claim pet. served on def. for this date.

- 14 The foregoing record of the proceedings of the above case
is hereby approved and certified as correct.

GEORGE C. KLAUDER,
Referee, First District.

Phila., Penna., July 15, 1918.

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V. Award of the Referee.

Pennsylvania Department of Labor and Industry.

Workmen's Compensation Bureau, Harrisburg, Pa.

Referee's Award or Disallowance of Compensation.

Claim Petition No. 5722.

MARIE E. POLK, Claimant,

vs.

PHILADA. & READING RY. CO., Defendant.

Hearing held at #1115 North American Building, Philada., Penna., on Tuesday, June 11th, 1918, at 10 A. M., at which there were present:

Mrs. Mary E. Polk, 3545 Janney Street, Philada., Penna., Claimant; Michael Hayes, Esq., Penn Square Bldg., Philada., Penna., Counsel for Claimant; and

George Gowen Parry, Esq., 133 South 12th Street, Philada., Penna., Counsel for Defendant; and George S. Whertley, 3240 West Huntingdon Street, Philada., Penna., Witness for Defendant.

Findings of Fact.

At the hearing the Claimant and Defendant agreed on the following facts:

First. On August 28th, 1917, neither John M. Polk nor the Defendant had filed with the Workmen's Compensation Bureau, nor served upon the other, notice of rejection of Article III of the Workmen's Compensation Act of 1915, in accordance with the provisions of said Act.

Second. On that date and for some time previous thereto, John M. Polk was in the employ of the Defendant, whose business was that of steam railway operator and whose place of business was at Philadelphia, Penna., as a brakeman;

Third. In said employment on that date his wages were payable on an hourly basis and during so much of the six months previous thereto as he worked for the Defendant his average weekly wage, exclusive of overtime, was Nineteen Dollars and Eighty Cents (\$19.80) and was payable semi-monthly;

Fourth. On that date John M. Polk while employed as a brakeman, on a freight train in the Port Richmond yard of the Defendant in Philada., Penna., handled by engine #832, was caught between two cars, and as a result thereof sustained certain injuries;

Fifth. The Defendant had immediate knowledge of the occurrence of said injuries.

Sixth. The Defendant furnished to John M. Polk proper and reasonable medical, surgical and hospital services, medicines and supplies, having him sent to the Episcopal Hospital, Philada.

Seventh. John M. Polk died August 29th, 1917, as a result of the injury so sustained, and the Defendant had due knowledge of the death of John M. Polk, and that it resulted from the injuries aforesaid.

Eighth. At the time of the occurrence of the injury the Defendant was a common carrier, by rail, engaged in both interstate and intrastate commerce.

17 The Referee finds the following additional facts:

First. The expense of the last sickness and burial of John M. Polk exceeded One Hundred Dollars (\$100.00) none of which has been paid by the Defendant:

Second. John M. Polk left to survive him the following dependents:

His widow—Marie E. Polk—who resided with him at the date of his death, and the following children—

John Polk, born December 8th, 1907.

Charles Polk, born April 12th, 1910.

George Polk, born April 12th, 1910.

Arthur Polk, born November 29th, 1915.

Third. At the time of the occurrence of the injury there was a draft of freight cars attached to the engine which was in charge of the crew of which John M. Polk was a member. Some of these cars were cars bound from points within the State of Pennsylvania to other points within the State of Pennsylvania, and the others were cars loaded with various commodities, some of which were bound from points outside the State of Pennsylvania to points within the State of Pennsylvania, and others, of which were bound from points within the State of Pennsylvania to points outside of the State of Pennsylvania, and there was at least one car of this draft of freight cars which was passing through Pennsylvania, from a point in New York to a point in Illinois.

It was contended by the Defendant that under these facts John M. Polk was at the time of the occurrence of the injury, engaged in performing duties incident to interstate commerce, and that, therefore, the Claimant was not entitled to compensation. It has been repeatedly held by the Workmen's Compensation Board, and by the Courts, that the burden of establishing the fact that an employe was at the time of the occurrence of the injury engaged in performing the duties incident to interstate commerce, is upon the

18 Defendant, who alleges this fact. In the present case we are of the opinion that the Defendant has failed to meet this

burden of proof. The Defendant contended that having shown that the work of the decedent as a member of this crew was work incident to interstate commerce, they have established the fact that the decedent was at the time of the occurrence of the injury actually engaged in performing such duties, and that therefore the Defendant had met the burden required of it. The Defendant offered no testimony whatever to show what work John M. Polk was performing at the time that he was injured; the Defendant simply showed that the draft of cars constituting the train, under the control of the crew of which John M. Polk was a member, contained cars en route in the course of interstate journeys, but we feel that it might well be that while this train was standing on the tracks in the yard awaiting further orders to proceed, or even for some other reason that the conductor of the crew or some other superior of Polk's might have delegated him to perform some duties for the Defendant which were not incident to nor necessary for the continuance of the interstate journey of the cars in this draft. The engine and crew were a yard engine and crew. The testimony shows that this crew had no duties to perform outside of the yard limits. We feel that, particularly with a crew of this sort, there may have been many things which this brakeman might have been delegated to perform while he was still a member of this crew and had in charge the cars shown by the Defendant to have been in this draft, entirely separate and apart from the movement of these cars, and of course in that case he would not have been at the time of the occurrence of the injury actually engaged in performing the duties incident to interstate commerce.

The Defendant further contended that since at the time of the occurrence of the injury the employe was a member of a crew having in charge interstate cars, necessarily he must have been performing some duty incident to these cars or else he would have been acting outside the course of his employment. In this we cannot agree. We feel that it is the duty of the Defendant to show just what the employe was doing at the time of the occurrence of the injury and thus establish by the weight of the evidence the fact that at the time of the occurrence of the injury the employe was actually engaged in work incident to interstate commerce; otherwise, the Referee could but guess as to what the employe was doing, and this, of course, he is not permitted to do. We are, therefore, of the opinion that the Defendant has not met the burden of proving that at the time of the occurrence of the injury John M. Polk was actually engaged in duties incident to interstate commerce.

Conclusions of Law.

On August 28th, 1917, both John M. Polk and the Defendant were bound by the terms of Article III of the Workmen's Compensation Act of 1915.

The injury sustained by John M. Polk on that date while acting in the course of his employment with the Defendant was such an

injury by accident as is contemplated by Article III, Section 301, of said Act; and since the Defendant had immediate knowledge of the occurrence of the injury; and since the death of John M. Polk resulted from said injuries, and the Defendant had due notice of his death and that it had so resulted; and since John M. Polk left to survive him a dependent widow and children; and since the Defendant has failed to meet the burden of proving that at the time of the occurrence of the accident John M. Polk was actually engaged in performing duties incident to interstate commerce,—the Claimants are entitled to compensation.

Award.

Under Article III, Section 307, compensation is awarded as follows:

To Marie E. Polk, One Hundred Dollars (\$100.00) on account of the expense of the last sickness and burial of John M. Polk and

20 Sixty Percent (60%) of the decedent's weekly wage of Nineteen Dollars and Eighty Cents (\$19.80) or Eleven Dollars and Eighty-eight Cents (\$11.88) per week, from August 29th, 1917, to May 29th, 1923; inclusive.

To the Guardian of John Polk, Charles Polk, George Polk and Arthur Polk, Forty-five Percent (45%) of decedent's weekly wage of Nineteen Dollars and Eighty Cents or Eight Dollars and Ninety-one Cents (\$8.91) per week, from May 30th, 1923, to December 7th, 1923, inclusive;

To the guardian of Charles Polk, George Polk and Arthur Polk, Thirty-five Percent (35%) of decedent's weekly wage of Nineteen Dollars and Eighty Cents (\$19.80) or Six Dollars and Ninety-three Cents (\$6.93) per week, from December 8th, 1923, to April 11th, 1926, inclusive;

To the Guardian of Arthur Polk, Fifteen Percent (15%) of decedent's weekly wage of Nineteen Dollars and Eighty Cents (\$19.80) or Two Dollars and Ninety-seven Cents (\$2.97) per week, from April 12th, 1926, to November 28th, 1931, inclusive.

(Signed)

GEO. C. KLAUDER,

Referee, First District,

Philada., Penna., July 15, 1918.

21 Pennsylvania Department of Labor and Industry.

Workman's Compensation Bureau,

Harrisburg, Pa.

Received Aug. 1, 1918. Workmen's Compensation Board.

Appeal from Referee's Findings of Fact.

(Section 419.)

July 31, 1918.

Claim Petition, No. 5722.

MARIE E. POLK, Claimant,

VS.

PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

To the Workmen's Compensation Board, Harrisburg, Pa.:

Defendant hereby appeals from the award of George C. Klauder, Esq., Referee of the First Compensation District, on the ground that the hereinafter specifically alleged findings of fact on which it is based are not supported by the evidence hereinafter set forth.

1. (Specify what particular findings of fact you allege are not supported by the evidence.) 3rd additional findings of fact in so far as it relates to defendant's failure to meet the burden of proof.

2. (Specify the evidence which you allege does not support the above findings of fact.) Testimony of George S. Whertley, testimony page 9, and agreed facts, testimony page 2 and award page 1.

PHILADELPHIA AND READING
RAILWAY COMPANY.

By GEORGE GOWEN PARRY,

(Name of Party Taking Appeal).

Its Attorney.

Address: George Gowen Parry, Attorney at Law, 609 Franklin Bldg., Phila.

Subscribed and sworn to before me this —, —, —.

My commission expires on the — day of —, 191—.

NOTICE.—This appeal must be filed within 10 days after the service of the notice of the referee's award or disallowance of compensation.

22 Pennsylvania Department of Labor and Industry,
 Workmen's Compensation Bureau,
 Harrisburg, Pa.

Received Aug. 1, 1918. Workmen's Compensation Board Referred
to —.

Appeal from Referee Alleging Error of Law.

(Section 419.)

July 31, 1918.

Claim Petition, No. —.

MARIE E. POLK, Claimant,

vs.

PHILADELPHIA AND READING RAILWAY COMPANY, Defendant.

To the Workmen's Compensation Board, Harrisburg, Pa.:

Defendant -by appeals from the award of George C. Klauder, Esq., Referee of the First Compensation District on the ground that upon the facts found by the said referee his award is not in accordance with the provisions of the Workmen's Compensation Act of 1915 in the following particulars:

1. The Referee erred in failing to reach the legal conclusion that the decedent and the defendant were engaged in inter-state commerce at the time the former was injured.

2. The Referee erred in reaching the legal conclusion that the claimant is entitled to compensation under the Workmen's Compensation Act of Pennsylvania.

3. The Referee erred in calculating the amount of the award.

PHILADELPHIA AND READING
RAILWAY COMPANY,
By GEORGE GOWEN PARRY,
(Name of Party Taking Appeal),
Its Attorney.

George Gowen Parry, Attorney at Law, 609 Franklin Bldg., Philadelphia.

NOTICE.—This appeal must be filed within 10 days after service of the notice of the Referee's award or disallowance of compensation.

23 Pennsylvania Department of Labor and Industry.

Workmen's Compensation Bureau.

Harrisburg, Pa.

Notice of Appeal from Referee.

(Secs. 419-420-421.)

Harrisburg, Pa., August 2, 1918.

Claim Petition, No. 5722.

Compensation Agreement No. —.

Appeal No. 929.

MARIE E. POLK, Claimant,

VS.

PHILADELPHIA & READING RY. Co., Defendant.

To Michael Hayes, Esq., Penn Square Bldg., Philadelphia, Pa.:

The Workmen's Compensation Board notifies you that the defendant has taken appeal from the award of compensation by Referee Klauder in the above case, copy of which is enclosed herewith. (See note at bottom of page.)

You should advise promptly whether you desire the appeal to be heard.

- (a) Without argument on your part.
- (b) On brief to be submitted.
- (c) On oral argument in person or by counsel.

If request to submit argument or brief is not made by either party the appeal will be considered by the Board at its first meeting after receipt of transcript of testimony from the Referee.

WORKMEN'S COMPENSATION BOARD.

_____,
Secretary.

NOTE.—When appeal is filed in duplicate, copy of same will be furnished with this notice. Otherwise, if copy is desired it should be obtained from the appellant.

G.
Enc.

3—844

24 Pennsylvania Department of Labor and Industry,
 Workmen's Compensation Board.

Notice of Hearing of Appeal.

Harrisburg, Pa., Sept. 8, 1919.

47000 Position No. _____

May 4, 1918.

Cooperation Agreement No. —

Appeal No. 1920

MAGNETIC FIELD EFFECTS ON CRYSTALLINITY

90

POOLE & BARNES, INC., Defendant.

To Michael Hayes, Esq.,
Penn Square Bldg., Phila.

Notice is hereby given that the Workmen's Compensation Board will hear argument on appeal from decision of Referee in above case at Philadelphia, 11th Floor N. American Building, at 2.00 P. M., Wednesday, September 11, 1918.

Please acknowledge receipt of this notice.

WORKMEN'S COMPENSATION BOARD

Sierra Nevada

Original copy of this notice served by mail as per date and address
hereon.

LEE SOLOMON,

Secretary

Fig. 11.

25 Pennsylvania Department of Labor and Industry.

Workmen's Compensation Board.

Notice of Hearing of Appeal.

Harrisburg, Pa., Sept. 4, 1918.

Claim Petition, No. 5722.

Compensation Agreement No. —.

Appeal No. A-929.

MARIE E. POLK, Claimant,

vs.

PHILADELPHIA & READING RY. CO., Defendant.

To George Gordon Perry, Esq.,

609 Franklin Bldg., Phila.

Notice is hereby given that *that* the Workmen's Compensation Board will hear argument on appeal from decision of Referee in above case at Philadelphia, 11th Floor N. American Building, at 2:00 P. M., Wednesday, September 11, 1918.

Please acknowledge receipt of this notice.

WORKMEN'S COMPENSATION BOARD.

Secretary.

Original copy of this notice served by mail as per date and address herein.

LEE SOLOMON,

Secretary.

Per H.

26

A. 929.

Department of Labor and Industry.
Workmen's Compensation Board.
Harrisburg, Pa.

Appeal from Award of Compensation by Referee Klauder, District
No. 1.

Claim Petition, No. 5722.

MARIE E. POLK, Claimant, 3545 Janney Street, Philadelphia, Pa.
v.

PHILA. & READING RAILWAY CO., Philadelphia, Pa., Defendant.

Appellant's Counsel: George Gowan Parry, Esq., 609 Franklin
Building, Philadelphia, Pa.

Appellee's Counsel: Michael Hayes, Esq., Penn Square Building,
Philadelphia, Pa.

Opinion.

MACKEY, *Chairman*:

The findings of fact and conclusions of law of the Referee are
adopted by the Board and the award is affirmed.

HARRY A. MACKEY,
Chairman.

Concurred in by Commissioners Scott and Leech.

Oct. 3, 1918.

27 In the Court of Common Pleas No. —, of Philadelphia
County, of September Term, 1918.

No. —.

Received Oct, 15, 1918. Workmen's Compensation Board
Referred to —.

Department of Labor and Industry.

Claim Petition, No. 3722.

MARIE E. POLK, Claimant.

VS.

PHILADELPHIA AND READING RAILWAY COMPANY, Defendant;

Philadelphia and Reading Railway Company, Insurance Carrier.

Philadelphia and Reading Railway Company, Appellant, appeals
from the decision of the Workmen's Compensation Board made Oc-
tober 4, 1918, on the claim above mentioned.

PHILADELPHIA AND READING
RAILWAY COMPANY,
By GEO. ZIEGLER,

Secretary.

COMMONWEALTH OF PENNSYLVANIA.

County of Philadelphia, ss:

George Ziegler on oath says that he is Secretary of Appellant
Company, and that this appeal is not taken for the purpose of delay,
but because the appellant believes that injustice has been done by
the decision appealed from.

GEO. ZIEGLER.

Sworn to and subscribed before me this 10th day of October A. D.
1918.

[SEAL.]

J. V. HARE,
Notary Public.

Commission expires March 1, 1919.

28 In the Court of Common Pleas No. —, of Philadelphia County,
of September Term, 1918.

No. —.

Bureau of Workmen's Compensation.

Claim Petition, No. 5722.

In the Matter of MARIE E. POLK, Claimant,

VS.

PHILADELPHIA AND READING RAILWAY COMPANY, Defendant.

VII. Exceptions Ex Parte Appellant to the Decision of the Workmen's Compensation Board.

1. The Compensation Board erred in reaching the legal conclusion that the claimant was entitled to compensation under the Workmen's Compensation Act of 1915.

2. The Compensation Board erred in failing to reach the conclusion that claimant's decedent and defendant were engaged in interstate commerce at the time decedent was injured.

3. The Compensation Board erred in holding that the defense of interstate commerce carries with it the burden of proof.

4. The Compensation Board erred in holding that the burden of proof was on the defendant to show that decedent was engaged in interstate commerce.

5. The Compensation Board erred in failing to hold that the burden of proof was on the claimant to show that the decedent came within the provisions of the Workmen's Compensation Act.

6. The Compensation Board erred in approving and adopting the findings and conclusions of the Referee.

7. The Compensation Board erred in allowing compensation to the claimant.

8. The claimant is not entitled to compensation.

9. The award of the Compensation Board is in conflict with the provisions of the Act of Congress of April 22, 1908, and supplements thereto, known as the "Federal Employers' Liability Act" and in violation of Article I, Section 8, of the Constitution of the United States.

29 10. The award of the Compensation Board in violation of the 14th Amendment to the Constitution of the United States, in that it deprives this defendant of its property without due process of law.

11. The decision of the Compensation Board is not warranted by law under the evidence in this case.

GEORGE GOWEN PARRY,
*Attorney for Philadelphia and Reading
Railway Company, Appellant.*

Certified from the Record this 14th day of October A. D. 1918.
[SEAL.] R. W. SNYDER,
Prothonotary.

Endorsement: No. 1919. C. P. No. 5, Sept. Term, 1918. Marie E. Polk vs. Philadelphia and Reading Railway Company. Copy. Defendant's Appeal and exceptions ex parte Appellant to the Decision of the Workmen's Compensation Board. Pd. Filed Oct. 11, 1918. Rains, Prothonotary. George Gowen Parry, Attorney at Law, 415 Reading Rerminal.

30 *Certiorari Workmen's Compensation Board.*

Form 136.

CITY AND COUNTY OF PHILADELPHIA, ss:

The Commonwealth of Pennsylvania to the Workmen's Compensation Board, Greeting:

We, being willing, for certain causes, to be certified of a certain action, between Marie E. Polk, Claimant, and Philadelphia and Reading Railway Company, Defendant and Insurance Carrier, before you depending, do command you, within ten days after service hereof to certify to our Court of Common Pleas, No. —, at Philadelphia, the entire Record as before you they now remain, together with this writ; that we may further cause to be done thereupon, that which of right and according to the Laws and Constitution of this Commonwealth ought to be done.

Witness the Honorable J. Willis Martin, President Judge of our said Court at Philadelphia, the 11th day of Oct., in the year of our Lord, one thousand nine hundred eighteen (1918).

HENRY F. WALTON,
Prothonotary.

By SOLOMON RAINS.

Received Oct. 15. Workmen's Compensation. Referred to —.

Endorsement: 191, Sep. Term, 1918. Court of Common Pleas No. 5, County of Philadelphia. Marie E. Polk vs. Philadelphia and Reading Railway Co. Certiorari to Workmen's Compensation Board. Parry.

31 I hereby certify that the foregoing is a true and complete transcript of record in the case of Marie E. Polk v. Philadelphia & Reading Railway Company, being proceedings under Claim

Petition #5722, in the Bureau of the Workmen's Compensation Board of Pennsylvania.

HARRY A. MACKEY,
Chairman.

Attest:

LEE SOLOMON,
Secretary to Board.

Endorsement: 1919, Sept. Ty. 1918. Court of Common Pleas No. 5 of Philadelphia County. Marie E. Polk v. Philadelphia & Reading Rwy. Co. Certified Copy of Transcript of Record, being proceedings under claim petition #5722 in the Bureau of the Workmen's Compensation Board of Pennsylvania. Filed Jan. 4, 1919. Hanna, Pro Prothy.

32 Workmen's Compensation Board.
Department of Labor and Industry,
Harrisburg.

Masonic Temple.

Hon. Henry F. Walton,
Proth'y, Common Pleas,
City Hall,
Phila.

Returned opened and filed Jan. 4, 1919. Hanna, Pro Proth'y

[Department of Labor and Industry,]*
[Masonic Temple,]*
[Harrisburg,]*

[Workmen's Compensation Bureau.]*

On margin: C P 5 S 18. #1919.

33 Common Pleas No. 5, Sept. Term, 1918.

No. 1919.

MARIE E. POLK

vs.

PHILADELPHIA & READING RAILWAY COMPANY; Philadelphia &
Reading Railway Company, Ins. Carrier.

SIR:

Enter *my* appearance for plaintiff in above case.

MICHAEL L. HAYES,
FRANCIS M. Mc ADAMS,
Attorneys for Plaintiffs.

To Prothon-tary C. P., Philadelphia, Pa.

[*Words enclosed in brackets erased in copy.]

Endorsement: No. 1919. September Term, 1918, C. P. No. 5. Marie E. Polk vs. Philadelphia & Reading Railway Company, Philadelphia & Reading Railway Company, Ins. Carrier. Appearance for Plaintiff. Filed Aug. 27, 1919. Michael D. Hayes, Pro Proth'y.

34 THE SUPREME COURT OF PENNSYLVANIA,
Eastern District, City and County of Philadelphia, ss:

The Commonwealth of Pennsylvania to the Judges of the Court of Common Pleas, No. 5, for the County of Philadelphia, Greeting:

We being willing for certain causes, to be certified of the matter of the appeal of Philadelphia and Reading Railway Company from the judgment of your said Court at No. 1919 of September Term, A. D. 1918, wherein Marie E. Polk was Plaintiff and the said appellant was Defendant, before you, or some of you, depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Philadelphia, in and for the Eastern District, the first Monday of January next (1920) so full and entire as in your Court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness, the Honorable J. Hay Brown, Doctor of Laws, Chief Justice of our said Supreme Court at Philadelphia, the twenty-seventh day of August in the year of our Lord one thousand nine hundred and nineteen.

[SEAL.]

WILLIAM A. STONE,
Prothonotary.

To the Honorable the Justices of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Eastern District:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

JOHN MONOGHAN. [SEAL.]
———. [SEAL.]

[Endorsed:] No. 1919 September Term, 1918, C. P. No. 5, Phila. No. 135, January Term, 1920, Supreme Court. Marie E. Polk v. Philadelphia and Reading Railway Company, Appellant. Certiorari to the Court of Common Pleas No. 5, for the County of Philadelphia. Returnable the first Monday of January, 1920. Rule on the Appellee, to appear and plead on the Return-day of the Writ. William A. Stone, Prothonotary. Aug. 27, 1919. Brought into office. M. Hanna, Dep. Prothy. Filed in Supreme Court Sep. 5, 1919, Philadelphia. George Gowen Parry.

35 In the Supreme Court of Pennsylvania for the Eastern District, Court of Common Pleas, No. 5, of the County of Philadelphia, September Term, 1918.

No. 1919.

MARIE E. POLK

vs.

PHILADELPHIA AND READING RAILWAY COMPANY, Defendant.

Enter appeal on behalf of Philadelphia and Reading Railway Company from the judgment of the Court of Common Pleas No. 5 of the County of Philadelphia.

GEORGE GOWEN PARRY,

Attorney for Appellant.

William A. Stone, Prothonotary.

SUPREME COURT, EASTERN DISTRICT,
County of Philadelphia, ss:

George Ziegler, Secretary of Philadelphia and Reading Railway Co., being duly sworn saith that said appeal is not taken for the purpose of delay, but because Appellant believes it has suffered injustice by the judgment from which it appeals.

GEO. ZIEGLER,
C. H.

Sworn to and subscribed, this 27th day of Aug. A. D. 1919.

[SEAL.]

J. V. HARE,
Notary Public.

Commission expires March 1, 1923.

[Endorsed:] No. 135, January Term, 1920, Supreme Court of Pennsylvania, Eastern District. Marie E. Polk vs. Philadelphia and Reading Railway Company. Appeal and Affidavit. Filed in Supreme Court Aug. 27, 1919, Philadelphia. George Gowen Parry, Attorney for Appellant, 415 Reading Terminal, Phila., Pa.

36 In the Supreme Court of Pennsylvania, Eastern District,
January Term, 1920.

No. 135.

MARIE E. POLK

VS.

PHILADELPHIA AND READING RAILWAY COMPANY, Appellant.

Assignments of Error.

Philadelphia and Reading Railway Company, the appellant above named, makes and files the following Assignments of Error in the above entitled case.

1. The Court below erred in dismissing defendant's first exception to the decision of the Workmen's Compensation Board, the said exception being as follows:

1. The Compensation Board erred in reaching the legal conclusion that the claimant was entitled to compensation under the Workmen's Compensation Act of 1915.

2. The Court below erred in dismissing defendant's second exception to the decision of the Workmen's Compensation Board, the said exception being as follows:

2. The Compensation Board erred in failing to reach the conclusion that claimant's decedent and defendant were engaged in interstate commerce at the time decedent was injured.

3. The Court below erred in dismissing defendant's third exception to the decision of the Workmen's Compensation Board, the said exception being as follows:

3. The Compensation Board erred in holding that the defense of interstate commerce carries with it the burden of proof.

4. The Court below erred in dismissing defendant's fourth exception to the decision of the Workmen's Compensation Board, the said exception being as follows:

37 4. The Compensation Board erred in holding that the burden of proof was on the defendant to show that decedent was engaged in interstate commerce.

5. The Court below erred in dismissing defendant's fifth exception to the decision of the Workmen's Compensation Board, the said exception being as follows:

5. The Compensation Board erred in failing to hold that the burden of proof was on the claimant to show that the decedent came within the provisions of the Workmen's Compensation Act.

6. The Court below erred in dismissing defendant's ninth exception to the decision of the Workmen's Compensation Board, the said exception being as follows:

9. The award of the Compensation Board is in conflict with the provisions of the Act of Congress of April 22, 1908, and supplement thereto, known as the "Federal Employers' Liability Act" and in violation of Article I, Section 8, of the Constitution of the United States.

7. The Court below erred in dismissing defendant's tenth exception to the decision of the Workmen's Compensation Board, the said exception being as follows:

10. The award of the Compensation Board is in violation of the 14th Amendment to the Constitution of the United States in that it deprives this defendant of its property without due process of law.

GEORGE GOWEN PARRY,

GEORGE GOWEN PARRY,

Attorney for Appellant.

38 [Endorsed:] 135. In the Supreme Court of Pa., Eastern District. Marie E. Polk vs. Philadelphia and Reading Railway Company, Appellant. Assignments of Error. Filed in Supreme Court Jan. 5, 1920, Philadelphia. George Gowen Parry, Attorney at Law, 415 Reading Terminal, Philadelphia.

39 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1920.

No. 135.

MARIE E. POLK

v.

PHILADELPHIA & READING RAILWAY COMPANY, Appellant.

Appeal from C. P. No. 5, Philadelphia.

Filed February 2, 1920.

Per Curiam:

The defense set up by the appellant to the claim made by the appellee for compensation for the death of her husband is that at the time he received his injuries he was a brakeman in its employ in connection with its interstate commerce business. The referee found that he was an employee of the appellant on a freight train, in the Port Richmond yard, in Philadelphia, at the time of his injuries, which resulted in his death on August 29, 1917. There was no presumption as to the character of his employment. If it was in connection with interstate commerce, as is alleged by appellant, the

burden was upon the latter to show that fact: *Hench v. Pennsylvania Railroad Company*, 246 Pa. 1; *Murray v. Pittsburgh, C., C. & St. L. Railroad Company*, 263 Pa. 398. The referee found as a fact that the appellant had failed to meet the burden of proof which rested upon it. His distinct finding was "the defendant offered no testimony whatever to show what work John M. Polk was performing at the time he was injured."

Appeal dismissed and award affirmed.

40 In the Supreme Court of Pennsylvania, Eastern District,
January Term, 1920.

No. 135.

MARIE E. POLK

VS.

PHILADELPHIA & READING RAILWAY COMPANY, Appellant.

To the Honorable J. Hay Brown, Chief Justice of the Supreme Court of Pennsylvania, and to the Other Justices of the Said Honorable Court, and to the Honorable Supreme Court of Pennsylvania:

The petition of Philadelphia and Reading Railway Company, appellant herein, respectfully represents:

That the above entitled case was an appeal by the defendant from the judgment of the Court of Common Pleas No. 5 of Philadelphia County dismissing an appeal from the decision of the Workmen's Compensation Board affirming an award of the Referee of the First Compensation District.

Your petitioner attaches hereto a copy of the opinion of this Honorable Court, together with a copy of the paper book of the appellant containing its brief and appendix and a copy of the paper book of the appellee.

That the opinion of this Honorable Court, filed February 2, 1920, indicates that its decision in affirming the judgment of the Court of Common Pleas is based on the following finding of the Referee:

"The defendant offered no testimony whatever to show what work John M. Polk was performing at the time he was injured."

This is quite true, but the reason the defendant offered no testimony on the point was because at the hearing before the Referee the claimant and the defendant stipulated upon the record that Polk was working as a brakeman on the train handled by, and attached to, engine No. 832 at the time he was killed, and the Referee so

found in his Fourth finding and Third additional finding.

41 The said findings were as follows:

"Fourth.—On that date John M. Polk while employed as a brakeman, on a freight train in the Port Richmond yard of the Defendant in Philada., Penna., handled by engine #832, was caught between two cars, and as a result thereof sustained certain injuries;"

"Third.—At the time of the occurrence of the injury there was a draft of freight cars attached to the engine which was in charge of the crew of which John M. Polk was a member. Some of these cars were cars bound from points within the State of Pennsylvania to other points within the State of Pennsylvania, and the others were cars loaded with various commodities, some of which were bound from points outside the State of Pennsylvania to points within the State of Pennsylvania, and others, of which were bound from points within the State of Pennsylvania to points outside of the State of Pennsylvania, and there was at least one car of this draft of freight cars which was passing through Pennsylvania, from a point in New York to a point in Illinois."

In accordance with the rule laid down in the decision of this Honorable Court, the defendant did offer testimony to show that the train attached to, and handled by, engine No. 832 was a train containing a number of interstate cars, and the Referee so found, as set forth in this Third additional finding of fact, *supra*.

That the finding of the Referee, "The defendant has not met the burden of proof that at the time of the occurrence of the injury, John M. Polk, was actually engaged in duties incident to interstate commerce," is wholly inconsistent with and contradictory to his other finding that he was at work as a brakeman on a train containing interstate cars in charge of the crew of which he was a member, to wit, the Fourth finding and Third additional finding, *supra*.

Your petitioner humbly submits that if the decedent Polk was at work on an interstate train, or in connection with the movement of an interstate train, the legal conclusion necessarily follows that he was engaged in interstate commerce.

42 That relying upon the agreement made at the hearing before the learned Referee, your petitioner deemed it unnecessary, upon the advice of Counsel, to offer testimony to prove either the agreed fact that Polk was at work on the train in question or the particular circumstances upon which the agreed fact was based.

That the defendant was at the time of the hearing before the Referee, and still is, able to prove the exact nature of the work that Polk was engaged in at the time of the accident, if given an opportunity to do so.

Therefore your petitioner respectfully prays that the judgment of this Honorable Court be reconsidered and the cause be remanded for a further hearing, in order that this appellant may have an opportunity to prove the circumstances upon which the agreed fact was based; or that a re-argument be ordered that the questions involved upon this record may be more clearly presented at bar.

And your petitioner will ever pray, etc.

GEORGE GOWEN PARRY.
GEORGE GOWEN PARRY.
Counsel for Petitioner Appellant.

43 STATE OF PENNSYLVANIA.
County of Philadelphia, ss:

Jay V. Hare, being duly sworn according to law, deposes and says that he is Assistant Secretary of Philadelphia and Reading Railway Company, the petitioner herein, and that the facts set forth in the foregoing petition are true to the best of his knowledge and belief.

J. V. HARE.

Sworn to and subscribed before me this 10th day of February, A. D. 1920.

[SEAL.]

K. KLINK,
Notary Public.

My Commission expires April 18, 1923.

I hereby certify that a copy of the foregoing petition has been served upon Counsel of record for the plaintiff above named.

GEORGE GOWEN PARRY,
Counsel for Petitioner Appellant.

44 In the Supreme Court of Pennsylvania, Eastern District,
 January Term, 1920.

No. 135.

Appeal from C. P. No. 5, Philadelphia.

MARIE E. POLK

v.

PHILADELPHIA & READING RAILWAY COMPANY, Appellant.

Filed February 2, 1920.

Per Curiam:

The defense set up by the appellant to the claim made by the appellee for compensation for the death of her husband is that at the time he received his injuries he was a brakeman in its employ in connection with its interstate commerce business. The referee found that he was an employee of the appellant on a freight train, in the Port Richmond yard, in Philadelphia, at the time of his injuries, which resulted in his death on August 29, 1917. There was no presumption as to the character of his employment. If it was in connection with interstate commerce, as is alleged by appellant, the burden was upon the latter to show that fact: *Hench v. Pennsylvania Railroad Company*, 246 Pa. 1; *Murray v. Pittsburgh, C. C. C. & St. L. Railroad Company*, 263 Pa. 398. The referee found as a fact that the appellant had failed to meet the burden of proof which

rested upon it. His distinct finding was "the defendant offered no testimony whatever to show what work John M. Polk was performing at the time he was injured."

Appeal dismissed and award affirmed.

Endorsement: No. 135, January Term, 1920, page 231. In the Supreme Court of Pa., January Term, 1920. Marie E. Polk vs. Philadelphia & Reading Railway Company, Appellant. Petition for Re-Argument. Feb. 16, 1920, re-argument refused: Per Curiam. Filed in Supreme Court Feb. 11, 1920, Philadelphia. George Gowen Parry, Attorney at Law, 415 Reading Terminal, Philadelphia.

45 In the Supreme Court of Pennsylvania, Eastern District,
January Term, 1920,

No. 135.

MARIE E. POLK

VS.

PHILADELPHIA AND READING RAILWAY COMPANY, Appellant.

Petition for Writ of Error.

To the Honorable J. Hay Brown, Chief Justice of the Supreme Court of Pennsylvania, and to the Honorable the Other Justices of the said Court, and to the Honorable the Supreme Court of Pennsylvania:

The petition of Philadelphia and Reading Railway Company respectfully represents:

1. That on May 29, 1918, Marie E. Polk filed with the Workmen's Compensation Bureau of the State of Pennsylvania claim petition No. 5722, under the Workmen's Compensation Act of Pennsylvania, in which it was alleged that the claimant's husband, John M. Polk, died on August 29, 1917, as the result of an accident occurring in the course of his employment as a brakeman while coupling cars in the yard of the Philadelphia and Reading Railway Company at Clearfield Street, Philadelphia, Pa., and that at the time of the accident he was employed by Philadelphia and Reading Railway Company.

2. That on June 5, 1918, the defendant, your petition- herein, filed an answer to the said claim petition denying certain allegations of fact in the claim petition, and denying liability to pay compensation on the ground that both claimant's decedent and the defendant were engaged in interstate commerce at the time the former was injured.

3. That on June 11, 1918, a hearing was had before the Referee of the First Compensation District, who, on July 15th, 1918, made

an award against the defendant of \$5,595.98. From this award the defendant appealed to the Workmen's Compensation Board of Pennsylvania, and on October 3rd, 1918, the said Board affirmed the award of the Compensation Referee.

46 4. That on October 10th, 1918, your petitioner appealed from the decision of the Workmen's Compensation Board, affirming the award of the Referee, to the Court of Common Pleas No. 5 of Philadelphia County, as of September Term 1918, No. 1919, filing exceptions thereto to the effect that the said award of the Workmen's Compensation Board was in conflict with the provisions of the Act of Congress of April 22, 1908, commonly called "The Federal Employers' Liability Act," in violation of Article 1, Section 8 of the Constitution of the United States and in violation of the 14th Amendment to the Constitution of the United States.

5. That on August 14, 1919, the Court of Common Pleas No. 5 of Philadelphia County dismissed the appeal of the defendant and directed judgment to be entered in accordance with the award of the Referee and of the Workmen's Compensation Board, whereupon, on August 27, 1919, your petitioner herein, appealed to your Honorable Court as of January Term 1920, No. 135.

6. That in the formal assignments of error filed by your petitioner in your Honorable Court, it formally excepted to the opinion of the Court of Common Pleas No. 5 of Philadelphia County, dismissing the appeal of the defendant, and directing judgment to be entered upon the award of the Referee and the Workmen's Compensation Board, *inter alia* in the following particulars:

"2. The Court below erred in dismissing defendant's second exception to the decision of the Workmen's Compensation Board, the said exception being as follows:

"2. The Compensation Board erred in failing to reach the conclusion that claimant's decedent and defendant were engaged in interstate commerce at the time decedent was injured."

4. The court below erred in dismissing defendant's fourth exception to the decision of the Workmen's Compensation Board, the said exception being as follows:

47 4. The Compensation Board erred in holding that the burden of proof was on the defendant to show that decedent was engaged in interstate commerce.

5. The Court below erred in dismissing defendant's fifth exception to the decision of the Workmen's Compensation Board, the said exception being as follows:

5. The Compensation Board erred in failing to hold that the burden of proof was on the claimant to show that the decedent came within the provisions of the Workmen's Compensation Act.

6. The Court below erred in dismissing defendant's ninth exception to the decision of the Workmen's Compensation Board, the said exception being as follows:

9. The award of the Compensation Board is in conflict with the provisions of the Act of Congress of April 22, 1908, and supplements thereto, known as the "Federal Employers' Liability Act," and in violation of Article I, Section 8 of the Constitution of the United States.

7. The Court below erred in dismissing defendant's tenth exception to the decision of the Workmen's Compensation Board, the said exception being as follows:

10. The award of the Compensation Board is in violation of the 14th Amendment to the Constitution of the United States in that it deprives this defendant of its property without due process of law."

7. That on February 2, 1920, the judgment of the Court of Common Pleas was affirmed by your Honorable Court on the ground that there was no presumption as to the character of the decedent's employment, and that if it was in connection with interstate commerce, the burden was upon the appellant to show that fact; that the Referee found as a fact that the appellant had failed to meet the burden of proof which rested upon it, his distinct finding being "the defendant offered no testimony whatever to show what work John M. Polk was performing at the time he was injured."

48 8. That on February 11, 1920, a petition for a reargument was filed with your Honorable Court by your petitioner herein, which petition was denied by your Honorable Court on February 16, 1920.

9. That the said judgment of your Honorable Court is the judgment of the highest court of the State of Pennsylvania, and is final and denies to your petitioner a right and privilege under the Act of Congress of February 22, 1908 aforesaid, and the right secured to it by the 14th Amendment to the Constitution of the United States.

Wherefore your petitioner prays that a writ of error may be allowed by your Honorable Court to bring before the Supreme Court of the United States for review and correction the errors complained of by the said final judgment of your Honorable Court and that your petitioner may have such other and further relief in the premises as may be just.

And your petition will ever pray, etc.

PHILADELPHIA AND READING
RAILWAY COMPANY.

By J. V. HARE.

Assistant Secretary.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Jay V. Hare, being duly sworn according to law deposes and says that he is Assistant Secretary of Philadelphia and Reading Railway Company, the petitioner above named, and that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

J. V. HARE.

Sworn to and subscribed before me this 19th day of February, A. D. 1920.

[SEAL.]

K. KLJNK.

Notary Public.

My Commission expires April 18, 1923.

Endorsement. Page 233.—In the Supreme Court of Pa., January Term, 1920. No. 135. Marie E. Polk vs. Philadelphia and Reading Railway Company, Appellant. Petition for Writ of Error. February 23, 1920. Writ of Error denied. Per Curiam. Filed in Supreme Court Feb. 29, 1920, Philadelphia. George Gowan
49 Parry, Attorney at Law, 415 Reading Terminal, Philadelphia.

50 In the Supreme Court of Pennsylvania, Eastern District,
January Term, 1920.

No. 135.

MARIE E. POLK

vs.

PHILADELPHIA AND READING RAILWAY COMPANY, Appellant.

To the Honorable J. Hay Brown, Chief Justice of the Supreme Court of Pennsylvania, and to the other Justices of the said Honorable Court, and to the Honorable Supreme Court of Pennsylvania:

The petition of Philadelphia and Reading Railway Company, Appellant herein, respectfully represents:

1. That on February 2, 1920, an opinion of this Court was filed affirming the judgment of the Court of Common Pleas No. 5 of Philadelphia County in favor of Marie E. Polk and against Philadelphia and Reading Railway Company, Appellant, in a cause of action in which the jurisdiction of the Workmen's Compensation tribunal was challenged on the ground that the claimant's decedent was engaged with the defendant in interstate commerce.

2. That the questions presented by the assignments of error in this cause, particularly those relating to the exclusive application of the

Federal Employers' Liability Act to cases where an employee of an interstate railroad is engaged in work incident to interstate commerce, are questions of broad general interest to railroad companies throughout the country; and your petitioner is advised by Counsel that it is desirable that the Supreme Court of the United States be asked to pass finally upon these questions in order that the management of the said companies be advised as to the proper disposition of similar cases arising in the future.

51 3. That the Act of Congress and the rules of the Supreme Court, in such cases made and provided, fix the time within which petitions for writs of certiorari be filed in the Supreme Court of the United States at three months, but your petitioner is prepared to perfect the record in this case and to file its petition for a writ of certiorari in the Supreme Court of the United States on or before the 5th day of April, 1920.

4. That your petitioner is advised that in order that the proceedings may remain in their present status pending the disposition of such a petition for a writ of certiorari, a special order of this Court is required to stay the issuing of the mandate.

Wherefore your petitioner prays that this Court enter an order directing the prothonotary of your Honorable Court to hold the mandate in this cause pending the filing of the aforesaid petition for a writ of certiorari in the Supreme Court of the United States until the 5th day of April, 1920, and that if said petition shall be filed in the Supreme Court of the United States on or before that day that the mandate be further held until the Supreme Court of the United States shall act upon the said petition for this writ of certiorari aforesaid.

And your petitioner will ever pray, etc.

PHILADELPHIA AND READING
RAILWAY COMPANY,
GEORGE GOWEN PARRY,
GEORGE GOWEN PARRY,

Counsel.

52

Order.

And now, to wit this — day of March, A. D. 1920, upon consideration of the foregoing petition and upon motion of George Gowen Parry, Esq., Counsel for Philadelphia and Reading Railway Company, Appellant, it is ordered that the mandate in the above entitled case shall not issue but shall be stayed until April 5, 1920; and that if on or before that day there shall be filed with the Prothonotary of this Court an affidavit of Counsel for Philadelphia and Reading Railway Company showing that a petition for a writ of certiorari has been filed by the said appellant in the Supreme Court of the United States that the mandate shall be held for a further period thereafter, and shall not issue before final disposition

shall be made by the Supreme Court of the United States of the petition for the writ of certiorari aforesaid.

Chief Justice.

Endorsement: #135, page 240. In the Supreme Court of Pa., January Term, 1920. Marie E. Polk vs. Philadelphia and Reading Railway Company, Appellant. Petition to stay the mandate pending application to the Supreme Court of the United States for Writ of Certiorari. Mar. 8, 1920, Petition denied, Per Curiam. Filed in Supreme Court, Mar. 4, 1920, Philadelphia. George Gowen Parry, Attorney at Law, 415 Reading Terminal, Philadelphia.

53 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1920.

No. 135.

MARIE E. POLK

vs.

PHILADELPHIA AND READING RAILWAY COMPANY, Appellant.

To the Honorable J. Hay Brown, Chief Justice of the Supreme Court of Pennsylvania, and to the other Justices of the said Honorable Court, and to the Honorable Supreme Court of Pennsylvania:

The petition of Philadelphia and Reading Railway Company, Appellant herein, respectfully represents:

1. That on February 2, 1920, an opinion of this Court was filed affirming the judgment of the Court of Common Pleas No. 5 of Philadelphia County in favor of Marie E. Polk and against Philadelphia and Reading Railway Company, Appellant, in a cause of action in which the jurisdiction of the Workmen's Compensation tribunals was challenged on the ground that the claimant's decedent was engaged with the defendant in interstate commerce.

2. That the questions presented by the assignments of error in this cause, particularly those relating to the exclusive application of the Federal Employers' Liability Act to cases where an employee of an interstate railroad is engaged in work incident to interstate commerce, are questions of broad general interest to railroad companies throughout the country, and your petitioner is advised by Counsel that it is desirable that the Supreme Court of the United States be asked to pass finally upon these questions in order that the management of the said companies be advised as to the proper disposition of similar cases arising in the future.

3. That the Act of Congress and the rules of the Supreme Court in such cases made and provided, fix the time
54 within which petitions for writs of certiorari may be filed in the Supreme Court of the United States at three months.

It is further provided by Rule 37 of the Supreme Court of the United States that the party making application for a writ of certiorari shall, as a part thereof, furnish the court with a certified copy of the whole record, that thirty (30) printed copies of the petition for the writ of certiorari and brief in support thereof shall be filed and notice of the date of submission of the petition, together with a copy of petition and brief in support of the same, shall be served on the Counsel for the respondent at least two weeks before such date.

4. That your petitioner promptly applied to the Prothonotary of your Honorable Court for a certified copy of the record in this cause, but the said certified copy has not yet been received and your petitioner is advised by the Prothonotary that it has not been possible to prepare it owing to the pressure of work in his office, but your petition is prepared to perfect the record in this case and to file its petition for a writ of certiorari in the Supreme Court of the United States on the 5th day of April, 1920, if a certified copy of the record can be obtained before that date.

5. That your petitioner is advised that in order that the proceedings may remain in their present status pending the disposition of such a petition for a writ of certiorari, a special order of this Court if required to stay the issuing of the mandate.

Wherefore your petitioner prays that this Court enter an order directing the prothonotary of your Honorable Court to hold the mandate in this cause pending the filing of the aforesaid petition for a writ of certiorari in the Supreme Court of the United States until the 5th day of April, 1920, and that if said petition shall be filed in the Supreme Court of the United States on or before that day that the mandate be further held until the Supreme Court of the United States shall act upon the said petition for this writ of certiorari aforesaid.

55 And your petitioner will ever pray, etc.

PHILADELPHIA AND READING
RAILWAY CO.,
By GEORGE GOWEN PARRY,
GEORGE GOWEN PARRY,

Counsel.

56

Order.

And now, to wit this 9th day of March, A. D., 1920, upon consideration of the foregoing petition and upon motion of George Gowen Parry, Esq., Counsel for Philadelphia and Reading Railway Company, Appellant, it is ordered that the mandate in the above entitled case shall not issue but shall be stayed until April 5, 1920; and that if on or before that day there shall be filed with the Prothonotary of this Court an affidavit of Counsel for Philadelphia and Reading Railway Company showing that a petition for a writ of certiorari has been filed by the said appellant in the Supreme Court of the United States that the mandate shall be

held for a further period thereafter, and shall not issue before final disposition shall be made by the Supreme Court of the United States of the petition for the writ of certiorari aforesaid.

J. HAY BROWN,
Chief Justice.

Endorsement: #135, page 248. In the Supreme Court of Pa., January Term, 1920. Marie E. Polk vs. Philadelphia and Reading Railway Company, Appellant. Petition to stay the mandate pending application to the Supreme Court of the United States for Writ of Certiorari. March 9, 1920, Petition granted. See Order inside. Filed in Supreme Court, Mar. 9, 1920, Philadelphia. George Gowen Parry, Attorney at Law, 415 Reading Terminal, Philadelphia.

57

January Term, 1920.

George Gowen Parry.

135.

MARIE E. POLK, Plaintiff,

VS.

PHILADELPHIA AND READING RAILWAY COMPANY, Defendant.

Appeal of Defendant.

No. 1919.

September Term, 1918, from the Judgment.

135.

Appeal from Court of Common Pleas, No. 5, of the County of Philadelphia.

Filed August 27, 1919.

Eo die, Certiorari exit.

Ret'ble first Monday, January, 1920.

September 5, 1919. Record returned & Filed.

January 5, 1920. Assignments of Error filed.

January 13, 1920. Argued.

February 2, 1920. Appeal dismissed and award affirmed. Per Curiam.

February 11, 1920. Petition for re-argument filed.

Feb. 16, 1920. Reargument refused. Per Curiam.

February 20, 1920. Petition for Writ of Error filed.

Feb. 23, 1920. Writ of error denied. Per Curiam.

March 4, 1920. Petition to stay the mandate pending application to the Supreme Court of the United States for writ of Certiorari filed.

Mar. 8, 1920. Petition denied. *Per Curiam*.

March 9, 1920. Petition to stay mandate pending application to Supreme Court of United States for writ of certiorari, filed.

And now, to wit, this 9th day of March, A. D. 1920, upon consideration of the foregoing petition and upon motion of Geo. Gowen Parry, Esq., Counsel for Phila. & Reading Rwy. Co., Appellant, it is ordered that the mandate in the above entitled case shall not issue but shall be stayed until April 5, 1920; and that if on or before that day there shall be filed with the Prothonotary of this Court an affidavit of Counsel for Phila. & Reading Rwy. Co. showing that a petition for a writ of certiorari has been filed by the said appellant in the Supreme Court of the United States that the mandate shall be held for a further period thereafter, and shall not issue before final disposition shall be made by the Supreme Court of the United States of the petition for the writ of certiorari aforesaid.

J. HAY BROWN, *J.*

58 I, J. Hay Brown, Chief Justice of the Supreme Court of Pennsylvania, do hereby certify, that Rudolph M. Schick was, at the time of signing the annexed attestation, and now is, Prothonotary pro tem, of the said Supreme Court of Pennsylvania, in and for the Eastern District, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this 18th day of March, one thousand nine hundred and twenty.

J. HAY BROWN.

I, Rudolph M. Schick, Prothonotary pro tem, of the Supreme Court of Pennsylvania, in and for the Eastern District, do certify, that the Honorable J. Hay Brown, by whom the foregoing certificate was made and given, was, at the time of making and giving the same, and is now, Chief Justice of the Supreme Court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the said Supreme Court of Pennsylvania, in and for the Eastern District, at Philadelphia, this 18th day of March, one thousand nine hundred and twenty.

[Seal of the Supreme Court of Pennsylvania, 1776.]

RUDOLPH M. SCHICK.

Prothonotary pro Tem.

59 STATE OF PENNSYLVANIA,
Eastern District:

I, Rudolph M. Schick, Prothonotary pro tem. of the Supreme Court of Pennsylvania, in and for the Eastern District, do hereby certify that the above and foregoing is a true copy of the record filed in the above entitled cause, so full and entire as appears of Record in said Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Philadelphia, this 18th day of March, A. D. 1920.

[Seal of the Supreme Court of Pennsylvania, 1776.]

RUDOLPH M. SCHICK,
Prothonotary pro tem.

UNITED STATES OF AMERICA, *ss.*:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Pennsylvania, Greeting:

Being informed that there is now pending before you a suit in which Philadelphia & Reading Railway Company is appellant, and Marie E. Polk is appellee, which suit was removed into the said Supreme Court by virtue of an appeal from the Court of Common Pleas No. 5, of the County of Philadelphia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixth day of May, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 27,599. Supreme Court of the United States, No. 844, October Term, 1919. Philadelphia & Reading Railway Company vs. Marie E. Polk. Writ of Certiorari. Filed in Supreme Court May 18, 1920, Philadelphia.

In the Supreme Court of the United States, October Term, 1919.

No. 844.

PHILADELPHIA & READING RAILWAY COMPANY, Petitioner,

vs.

MARIE E. POLK, Respondent.

Stipulation.

The Writ of Certiorari in the above entitled case having been granted to the above entitled petitioner to review the judgment and decision of the Supreme Court of the State of Pennsylvania in the above case, in which Philadelphia & Reading Railway Company was Appellant and Marie E. Polk was Appellee:

Now it is therefore stipulated and agreed between counsel for the above named petitioner and counsel for the above named respondent that the Transcript of Record of the said Supreme Court of Pennsylvania in said cause now on file in the Supreme Court of the United

States be taken as a return to the said writ and that the Prothonotary of the Supreme Court of Pennsylvania forward a certified copy of this stipulation to the Clerk of the Supreme Court of the United States forthwith, as his return to the said Writ of Certiorari.

Done the 10th day of May, A. D. 1920.

GEORGE GOWEN PARRY,
Counsel for Above Petitioner.
FRANCIS M. McADAMS,
Counsel for Above Respondent.

Endorsement: #844. U. S. Supreme Ct., Oct. T., 1919.—Philadelphia & Reading Railway Company, Petitioner, vs. Marie E. Polk, Respondent.—Stipulation for Return of Writ of Certiorari.—Filed in Supreme Court May 18, 1920, Philadelphia.—George Gowen Parry Attorney at Law, 415 Reading Terminal, Philadelphia.

STATE OF PENNSYLVANIA,
Eastern District:

Supreme Court Office.

Philadelphia, May 18, 1920.

In obedience to the writ of certiorari hereto attached and returned herewith, I hereby certify that the foregoing contains a true copy of the stipulation of counsel in the case therein stated, as appears from the original now of file in this office.

Witness my signature and the seal of said court hereto affixed, the day and year above written.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

RUDOLPH M. SCHICK,
Prothonotary pro Tem.

[Endorsed:] 844/27,599. File No. 27,599. Supreme Court of the United States, No. 844, October Term, 1919. Philadelphia & Reading Railway Company vs. Marie E. Polk. Writ of Certiorari and Return.

[Endorsed:] File No. 27,599. Supreme Court U. S., October Term, 1919. Term No. 844. Philadelphia & Reading Ry. Co., Petitioner, vs. Marie E. Polk. Writ of certiorari and return. Filed May 18, 1920.

NOTICE OF PETITION

**IN THE
Supreme Court of the United States**

PHILADELPHIA AND READING RAILWAY COMPANY,
Petitioner,

vs.

MARIE E. FOLE, Respondent.

**PETITION FOR WRIT OF HABEAS CORPUS, NOTICE OF PRESEN-
TATION, AND BRIEF IN SUPPORT OF PETITION.**

GEORGE GOWEN FERRY,

Counsel for Petitioner,
**415 BRIDGE STREET,
PHILADELPHIA, PA.**

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In the Supreme Court of the United States.

OCTOBER TERM, 1920. No. .

Philadelphia and Reading Railway Company, Petitioner,

vs.

Marie E. Polk, Respondent.

MARCH 17, 1920.

SIRS:—Please take notice that upon the annexed petition of Philadelphia and Reading Railway Company, a certified copy of the entire transcript of the record of this cause, including the proceedings in the Supreme Court of Pennsylvania, submitted herewith, and the petitioner's brief, also to be submitted upon the presentation of the petition, an application will be made to the Supreme Court of the United States, at a term of said Court, appointed to be held at the Capitol, Washington, D. C., on Monday, the fifth day of April, 1920, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, for a writ of *certiorari* to be directed to the Supreme Court of the State of Pennsylvania, to review the decree or judgment of said Court, rendered in the above cause on the second day of February, 1920, which affirmed the decree or judgment of the Court of Common Pleas No. 5

of Philadelphia County, Pennsylvania, entered in said Court on the fourteenth day of August, 1919, upon an award of the Workmen's Compensation Board of Pennsylvania, in favor of Marie E. Polk, the respondent, for the sum of \$5,595.98.

Dated at Philadelphia, March 20th, 1920.

GEORGE GOWEN PARRY,

Counsel for Petitioner.

415 Reading Terminal, Philadelphia, Pa.

*To M. D. Hayes, Esq., F. H. McAdams, Esq., Counsel
for Respondent, Penn Square Building, Philadelphia,
Pa.*

In the Supreme Court of the United States.

OCTOBER TERM, 1920. No.

Philadelphia and Reading Railway Company, Petitioner,

vs.

Marie E. Polk, Respondent.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Philadelphia and Reading Railway Company, in support of this, its petition for a writ of *certiorari* to be directed to the Supreme Court of the State of Pennsylvania, the highest Court in the State in which a decision could be had to review a final decree or judgment rendered on the second day of February, 1920, which affirmed the decree of the Court of Common Pleas No. 5 of Philadelphia County, Pennsylvania, entered on the fourteenth day of August, 1919, upon an award of the Compensation Referee, adopted and affirmed by the Workmen's Compensation Board of the State of Pennsylvania, in favor of Marie E. Polk for the sum of \$5,595.98, respectfully shows:—

1. That this action was begun by petition under the Workmen's Compensation Act of the State of Pennsylvania, filed by Marie E. Polk, dependent widow of John

M. Polk, claiming an award of compensation for the accidental death of her husband, which occurred while in the course of his employment as a freight brakeman of the Philadelphia and Reading Railway Company.

2. That your petitioner duly filed its answer to the said petition, denying liability under the Workmen's Compensation Act of Pennsylvania for the said accident, on the ground that the said Polk was engaged with the defendant in interstate commerce at the time he was injured.

3. That the record, a certified copy of which is presented herewith, shows that there is no conflict of evidence, the claimant relying solely upon the ground that the defendant did not call witnesses to prove a fact which had already been stipulated upon the record by agreement between the parties.

4. That the record shows that Polk, who was a brakeman in the freight service of the defendant railway company, was crushed between two cars in a freight train which was being handled by the defendant's engine, No. 832. Polk was a member of the crew of this engine and was at work in the course of his employment on this train when he was hurt. The train contained a number of cars, some of which were moving and en route from points outside the State of Pennsylvania to points within and without the State, and others which had originated in the State and were bound to points outside of it. The engine and crew were concerned merely with moving the train through the defendant's Port Richmond Yard in Philadelphia, Pennsylvania, and their usual duties did not take them beyond the yard limits.

5. The Compensation Referee, although incorporating in his findings of fact the agreement of the parties that "Polk was employed as a brakeman on a freight train in the Port Richmond Yard of the defendant in Philada.,

Penna., handled by engine No. 832, was caught between two cars and as the result thereof sustained certain injuries," and finding further that this train contained a number of interstate cars, made an award of compensation to the claimant on the ground that "the defendant offered no testimony whatever to show what work John M. Polk was performing at the time he was injured" and therefore the defendant had not met the burden of proof that "Polk was actually engaged in duties incident to interstate commerce."

6. The Workmen's Compensation Board of the State of Pennsylvania adopted the Referee's findings of fact and conclusions of law and affirmed the award. The Court of Common Pleas, upon appeal, directed judgment to be entered in accordance with the award of the Referee and the Workmen's Compensation Board and dismissed the appeal. This judgment was affirmed by the Supreme Court of Pennsylvania on the ground that "the Referee found as a fact that the appellant had failed to meet the burden of proof which rested upon it. His distinct finding was 'the defendant offered no testimony whatever to show what work John M. Polk was performing at the time he was injured.'" A petition for reargument was denied.

7. That in addition to the question that the finding of the Referee conclusively establishes the fact that Polk was actually engaged in the course of his employment as a brakeman on an interstate train when he was injured, the question is raised that the judgment affirmed by the Supreme Court of Pennsylvania is absolutely devoid of any fact to sustain the conclusion that Polk was engaged in intrastate commerce and so entitled to an award under the Workmen's Compensation Act of Pennsylvania, and hence the denial of due process of law would seem to be involved by a judgment against your petitioner which is without any basis of fact to support it.

These questions were duly raised and argued by your

petitioner before the Referee, the Compensation Board, the Court of Common Pleas and the Supreme Court of Pennsylvania.

8. That when the finding of the Compensation Referee was in part as follows:—

"Fourth.—On that date John M. Polk while employed as a brakeman on a freight train in the Port Richmond Yard of the defendant in Phila., Penna., handled by engine #832, was caught between two cars, and as a result thereof sustained certain injuries.

"Third.—At the time of the occurrence of the injury there was a draft of freight cars attached to the engine which was in charge of the crew of which John M. Polk was a member. Some of these cars were cars bound from points within the State of Pennsylvania to other points within the State of Pennsylvania, and the others were cars loaded with various commodities, some of which were bound from points outside the State of Pennsylvania to points within the State of Pennsylvania, and others of which were bound from points within the State of Pennsylvania to points outside of the State of Pennsylvania, and there was at least one car of this draft of freight cars which was passing through Pennsylvania, from a point in New York to a point in Illinois.

"The defendant offered no testimony to show what work John M. Polk was performing at the time that he was injured; the defendant simply showed that the draft of cars constituting the train, under the control of the crew of which John M. Polk was a member, contained cars enroute in the course of interstate journeys, but we feel that it might well be that while this train was standing on the tracks in the yard awaiting further orders to proceed, or even for some other reason that the conductor of the crew or some other superior of Polk's might have delegated him to perform some duties

for the defendant which were not incident to nor necessary for the continuance of the interstate journey of the cars in this draft. The engine and crew were a yard engine and crew. The testimony shows that this crew had no duties to perform outside of the yard limits. We feel that, particularly with a crew of this sort, there may have been many things which this brakeman might have been delegated to perform while *he was still a member of this crew and had in charge the cars shown by the defendant to have been in this draft*, entirely separate and apart from the movement of these cars, and of course in that case he would not have been at the time of the occurrence of the injury actually engaged in performing the duties incident to interstate commerce."

It was error for the Supreme Court of Pennsylvania to base its affirmance of the judgment upon the finding that "the defendant offered no testimony whatever to show what work John M. Polk was performing at the time he was injured" for it utterly ignores the facts established by the fourth agreed finding, that he was actually employed as a brakeman on the train of engine No. 832 when he was injured by being caught between two cars, and by the third additional finding that "the train was an interstate train and was under the control of the crew of which John M. Polk was a member," which had in charge the cars shown by the defendant to have been in the train.

9. Whether there was any burden of evidence resting on the defendant below and whether the defendant failed to meet that burden, are questions of law and neither the Compensation Referee nor the Supreme Court of Pennsylvania could change their essential character by calling them findings of fact. While it is true that the defendant called no witnesses to show what work Polk was performing at the time he was injured, it is equally true that the fact had been established by stipulation between the parties and the fourth finding of the Referee was based thereon.

10. That the question of law for determination by the Compensation Referee was as follows:—

“Is a brakeman engaged in interstate commerce while at work on a freight train containing cars bound from points without and within the State of Pennsylvania to points within and without the said State?”

This question arose upon the undisputed and agreed fact that Polk when injured was doing a brakeman's work on the train and upon the fact, found from the testimony, that the train was composed of interstate cars.

11. That the judgment below proceeds flatly upon the ground that the defendant failed to prove by testimony the work that Polk was doing when he was hurt and that it had therefore failed to meet the burden of proof resting upon it to show that he was engaged at the time in interstate commerce. Hence the conclusion is reached that the case comes within the State Compensation law, although that law can only apply if the claimant's decedent was engaged in interstate commerce.

12. That the record fails to disclose any fact to support this conclusion, which does not appear to be in concord with the decision of your Honorable Court which has repeatedly held that a finding without evidence is arbitrary and baseless and works a denial of fundamental rights.

13. That the Act of Congress, which exclusively regulates the liability of master to servant with respect to personal injury sustained in interstate railroad service, practically ceases to exist in Pennsylvania as a bar to Compensation proceedings, if the State Courts may disregard competent and conclusive evidence and treat as matter of fact a finding that a defendant railroad has failed to meet the burden of proof.

14. That it therefore follows that, unless this Court shall correct the errors of the Court below, your petitioner will be deprived of a right, privilege and immunity under

the Federal Employers' Liability Act and a right guaranteed by the due process clause of the XIV Amendment to the Federal Constitution, in this and all similar cases brought hereafter in the State of Pennsylvania.

Wherefore your petitioner prays that a writ of *certiorari* may issue out of and under the seal of this Court, directed to the Supreme Court of the State of Pennsylvania, commanding that Court to certify the case to this Court for review and determination, as provided in the Act of Congress known as the Judicial Code, or that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate and in conformity with the said Act.

And your petitioner will ever pray, etc.

PHILADELPHIA AND READING RAILWAY
COMPANY,

By

AGNEW T. DICE,

President.

[SEAL]

GEORGE GOWEN PARRY,

Counsel for Petitioner.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } ss.

AGNEW T. DICE, being duly sworn, says that he is President of Philadelphia and Reading Railway Company, the petitioner named in the foregoing petition, that he has read the same and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information and belief.

AGNEW T. DICE.

Sworn to and subscribed before me this 20th day of March, A. D. 1920.

[SEAL]

J. V. HARE,

Notary Public.

My Commission expires March 1, 1923.

No.

October Term, 1900.

IN THE
Supreme Court of the United States

PHILADELPHIA AND READING RAILWAY COMPANY,
Petitioner,

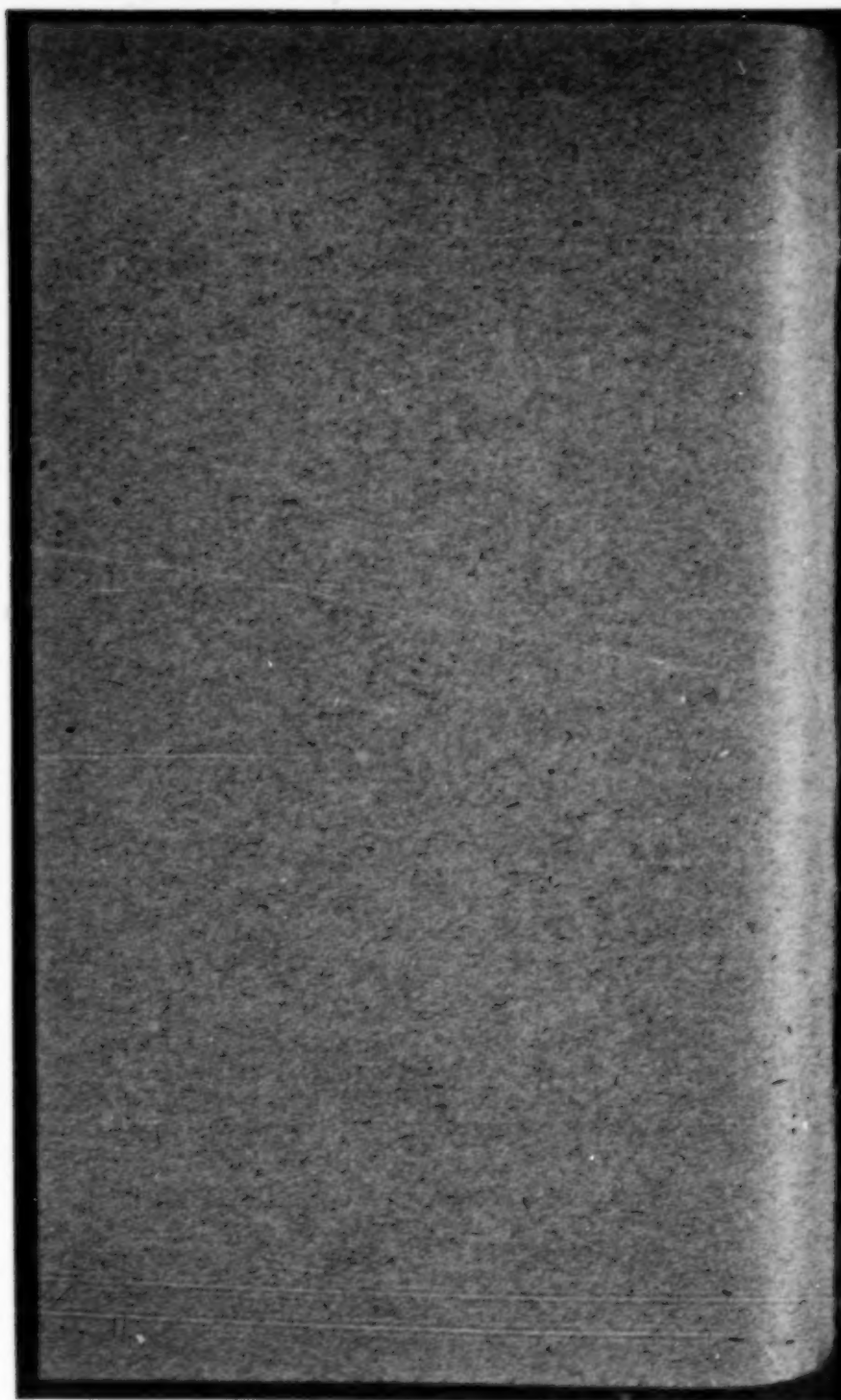
vs.

MARIE E. FOLK, Respondent.

BRIEF FOR PETITIONER ON APPLICATION FOR WRIT OF
CERTIORARI.

GEORGE GOWEN FARRY,

Counsel for Petitioner,
415 READING TERMINAL,
PHILADELPHIA, PA.



In the Supreme Court of the United States.

OCTOBER TERM, 1920. No. .

Philadelphia and Reading Railway Company, Petitioner,

vs.

Marie E. Polk, Respondent.

PETITIONER'S BRIEF ON APPLICATION FOR WRIT OF CERTIORARI.

The question involved in this case is of great importance not only to interstate carriers by railroad, and the employees of such carriers engaged in interstate commerce, but to those persons engaged in the trial of cases under the Federal Employers' Liability Act, and the Workmen's Compensation Act of Pennsylvania.

Is a brakeman engaged in interstate commerce while employed on a freight train containing cars bound from points without and within the State of Pennsylvania to points within and without the said State?

The answer to this question is not far to seek. It is settled beyond argument that a train containing cars bound from a point in one State to a point in another State, or

shipments so consigned, is an interstate train, and those employed in moving or facilitating the movement of such cars or shipments are engaged in interstate commerce. This is true when such employee's duties are exclusively performed within the boundaries of a State.

In *N. P. Ry. vs. State of Washington*, 222 U. S. 370, at 375, Chief Justice White said:—

"The train though moving from one point to another in the State of Washington, was hauling merchandise from points outside the State destined to points within the State and from points within the State to points in British Columbia. This transportation was interstate commerce, and the train was an interstate train, despite the fact that it may also have been carrying some local freight. In view of the unity and indivisibility of the service of the train crew, and the paramount character of the authority of Congress to regulate commerce, the Act of Congress was exclusively controlling." *Sou. Ry. vs. U. S.*, 222 U. S. 20.

To the same effect are *Railway Co. vs. Knapp*, 233 Fed. Rep. 950, and *Railroad Co. vs. Carr*, 238 U. S. 260; *Waters vs. Guile*, 234 Fed. Rep. 552. We proceed then to consider whether the character of the train in question brings the case within the scope of these authorities.

Of this there does not seem to be the slightest room for doubt. The Referee, whose findings were adopted and affirmed by the Compensation Board, said in his third additional finding of fact:—"At the time of the occurrence of the injury there was a draft of freight cars attached to the engine which was in charge of the crew of which John M. Polk was a member. Some of these cars were bound from points within the State of Pennsylvania to other points with the State of Pennsylvania, and the others were cars loaded with various commodities, some of which

were bound from points outside the State of Pennsylvania to points within the State of Pennsylvania and others of which were bound from points within the State of Pennsylvania to points outside of the State of Pennsylvania, and there was at least one car of this draft of freight cars which was passing through Pennsylvania from a point in New York to a point in Illinois."

Referee's award, pages 26, 27.

And in the fourth agreed finding of fact the Referee said:—

"John M. Polk while employed as a brakeman, on a freight train in the Port Richmond Yard of the defendant in Philada., Penna., handled by engine #832, was caught between two cars, and as a result thereof sustained certain injuries." Referee's award, page 26.

The findings when read together can only mean that Polk was a brakeman on the crew of engine 832; that while he was working on an interstate train handled by and attached to engine 832 he was caught between two of the cars in that train and injured.

It would seem then that the claimant's decedent was injured while engaged in interstate commerce within the meaning of the Federal Employers' Liability Act and that any right of action growing out of his death resulting from the said injury must be based upon the said Act and not upon the Workmen's Compensation Act of Pennsylvania.

The Compensation Referee made an award of compensation to the claimant for reasons which appear to us to be altogether frivolous. It is clear that no doubt was entertained that Polk was at work on an interstate train, but the Referee sought to evade the legal conclusion that this constituted an employment in interstate commerce, by asserting that the defendant below had failed to meet the burden of proof because it did not by testimony specifically

exclude every conceivable task, unrelated to interstate commerce, either on or off the train, that a brakeman might perform if ordered to. We did not think it lay in human ingenuity or perversity to imagine or impose such a test. And if there ever was such a rule of law what reason had the defendant to call witnesses to exclude a mere possibility which had already been excluded by an established fact to the contrary.

It appears from the award that the claimant came to the hearing without witnesses in her behalf. It was clear that she could not make out a *prima facie* case unless she proved that her husband was at work when injured, so the defense had only called a witness to prove the character of the train in question, if it was put to proof at all. The claimant herself could prove nothing but dependency and funeral expenses and unless the defense agreed to admit other facts essential to her proof the case could not go on. At the request of the Referee, the defense agreed that Polk was working in the course of his employment as a brakeman on the train hauled by engine 832 and that while so employed he was crushed between two of the cars. This agreement the Referee undertook to incorporate and did incorporate in his findings of fact (award, pages 26, 27, 28).

In view then of the agreement and findings it is difficult to treat seriously the learned Referee's critical and elaborate discussion to reach the conclusion that there is no proof of what Polk was doing when he was hurt. True there is nothing to show whether he was applying a brake, coupling an air hose, signalling the engineman or the like, but this we submit is utterly immaterial, for if the finding had been, for instance, that Polk was making a coupling, it could have had no greater effect than to support the inference that he was employed in doing a brakeman's work. Now it is established as an undisputed fact that he was employed in the performance of his duties, in the course of his employment as a brakeman on this interstate train and the ruling of the Referee is reduced to this: Although it

is agreed that a man was employed in the performance of his duties as a brakeman on a certain train, it is, nevertheless essential to prove the performance of a particular task to support the inference agreed upon.

To state this proposition is to condemn it.

The Supreme Court of Pennsylvania affirmed the award upon the ground that "The Referee found as a fact that the appellant (your petitioner) had failed to meet the burden of proof which rested upon it. His distinct finding was "the defendant offered no testimony whatever to show what work John M. Polk was performing at the time he was injured." This, it is submitted was error, for it altogether ignores the specific findings of the Referee that Polk was doing a brakeman's work on an interstate train. If the Referee's findings were conclusive upon the learned Court below, it is clear that one finding could not be more conclusive than another, yet the essential finding of fact is ignored by the Court to fasten upon one that is altogether immaterial.

It must also be clear that the proof for the defendant which the Supreme Court of Pennsylvania finds to be insufficient rests on exactly the same basis as the proof for the claimant. By the word "testimony" we presume we are to understand the statement of a witness under oath, and while it is true that no witness was called by the defendant to show the nature of Polk's work, it is equally true that no witness was called by the claimant to show that he was at work at all. We do not think the question of the burden of proof is here involved at all; for when the parties to the action agreed that claimant's decedent was working on a particular train it was surely unnecessary to call witnesses to prove it. To argue this question is to quibble over words; a fact agreed upon in no way differs from a proven fact; it is established beyond cavil.

In the face then, of the specific finding that Polk was at work, in the course of his employment, as a brakeman on an interstate train; the finding that the defendant called no witness to show what work he was doing is, we submit, immaterial.

It seems scarcely necessary to point out that there was no burden upon the defendant to do anything until the

claimant proved facts to support a conclusion that her decedent was within the Compensation Act. If the claimant be deemed to have sustained the burden of proof by the finding that the decedent was employed as a brakeman on a particular train when he was injured, then, if there was any burden on the defendant to show the character of the employment, it must be deemed to have sustained it by the finding that Polk was employed as a brakeman on an interstate train.

In his award affirmed by the Supreme Court of Pennsylvania, the Referee said:—

“We feel that it might well be that while this train was standing on the tracks in the yard awaiting further orders to proceed or even for some other reason that the conductor of the crew or some other superior of Polk’s might have delegated him to perform some duties for the defendant which were not incident to or necessary for the continuance of the interstate journey of the cars in this draft. The engine and crew were a yard engine and crew. The testimony shows that this crew had no duties to perform outside of the yard limits. We feel that, particularly with a crew of this sort, there may have been many things which this brakeman might have been delegated to perform while he was still a member of this crew and had in charge the cars shown by the defendant to have been in this draft, entirely separate and apart from the movement of these cars, and of course in that case he would not have been at the time of the occurrence of the injury actually engaged in performing the duties incident to interstate commerce.”

Referee’s award page 27.

This is no more than idle speculation. In the first place there is no finding of fact that the train was standing on the tracks in the yard waiting orders to proceed and no finding that Polk was delegated by anybody to perform any duties

incident to ^{INTRA}~~inter~~state commerce, or, as the Referee puts it, "entirely separate and apart from the movement of these cars." Yet the award is based flatly on the ground that the defendant failed to exclude by proof some such possibility. It would seem, therefore, that the judgment has no foundation of fact on which to rest.

In *Louisville and Nashville R. R. v. Finn*, 235 U. S. 601, the Court said:—

"It has repeatedly been held by this Court that an administrative order made indisputably contrary to the evidence or without any evidence, must be deemed arbitrary and therefore subject to be set aside."

This Court has also repeatedly held that a Federal right is denied by the result of a finding without evidence to support it. *N. P. R. R. v. North Dakota*, 236 U. S. 585; *K. C. So. Ry. v. Albers*, 223 U. S. 573; *Mackay v. Dillon*, 4 Howard 421; *Dower v. Richards*, 151 U. S. 658; *Stanley v. Schwalby*, 162 U. S. 255. Here after an express finding that Polk, when injured, was working as a brakeman on the train, the conclusion is reached that there is no proof that he was not doing some other work, and in consequence he was employed in some task incident to intrastate commerce. The denial of due process of law would seem to be involved by a judgment against the appellant without finding of fact to support it.

It is respectfully submitted that the writ of *certiorari* be granted as prayed for.

GEORGE GOWEN PARRY,
Counsel for Petitioner.

APPENDIX.

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IN THE SUPREME COURT OF PENNSYLVANIA.

January Term, 1920.

Marie E. Polk, Plaintiff,

135.

vs.

Geo. Gowen Philadelphia and Reading Railway
Company, Defendant.

Appeal of Defendant.

No. 1919 September Term 1918
from the judgment.

Appeal from Court of Common
Pleas No. 5 of the County of
Philadelphia.

Filed August 27, 1919.

Eo die. Certiorari exit.

Retble. first Monday January 1920.

September 5, 1919. Record re-
turned and filed.

January 5, 1920. Assignments of
Error filed.

January 13, 1920. Argued.

February 2, 1920. Appeal dis-
missed and award affirmed.

Per Curiam.

February 11, 1920. Petition for
re-argument filed.

February 16, 1920. Reargument
refused, *Per Curiam.*

February 20, 1920. Petition for
Writ of Error filed.

February 23, 1920. Writ of error
denied: *Per Curiam.*

March 4, 1920. Petition to stay
the mandate pending application
to the Supreme Court of the
United States for writ of *certi-
orari* filed.

March 8, 1920. Petition denied:
Per Curiam.

March 9, 1920. Petition to stay
mandate pending application to
Supreme Court of United States
for writ of *certiorari*, filed.

And now, to wit, this 9th day of
March, A. D. 1920, upon consid-
eration of the foregoing petition
and upon motion of Geo. Gowen
Parry, Esq., Counsel for Phila.
& Reading Rwy. Co., Appellant,
it is ordered that the mandate in
the above entitled case shall not
issue but shall be stayed until
April 5, 1920; and that if on or
before that day there shall be
filed with the Prothonotary of
this Court an affidavit of Coun-
sel for Phila. & Reading Rwy.
Co., showing that a petition for
a writ of *certiorari* has been
filed by the said appellant in the
Supreme Court of the United
States that the mandate shall be
held for a further period there-
after, and shall not issue before
final disposition shall be made
by the Supreme Court of the
United States of the petition for
the writ of *certiorari* aforesaid.

J. HARY BROWN, J.

IN THE SUPREME COURT OF PENNSYLVANIA, EASTERN
DISTRICT.

January Term, 1920. No. 135.

Mary E. Polk,

vs.

Philadelphia and Reading Railway Company, Appellant.

Appeal from Common Pleas, No. 5, Philadelphia.

Filed February 2, 1920.

Per Curiam:

The defense set up by the appellant to the claim made by the appellee for compensation for the death of her husband is that at the time he received his injuries he was a brakeman in its employ in connection with its interstate commerce business. The referee found that he was an employee of the appellant on a freight train, in the Port Richmond yard, in Philadelphia, at the time of his injuries, which resulted in his death on August 29, 1917. There was no presumption as to the character of his employment. If it was in connection with interstate commerce, as is alleged by appellant, the burden was upon the latter to show that fact: *Hench vs. Pennsylvania Railroad Company*, 246 Pa. 1; *Murray vs. Pittsburgh, C., C. & St. L. Railroad Company*, 263 Pa. 398. The referee found as a fact that the appellant had failed to meet the burden of proof which rested upon it. His distinct finding was "the defendant offered no testimony whatever to show what work John M. Polk was performing at the time he was injured."

Appeal dismissed and award affirmed.

AWARD OF THE REFEREE.

PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY.

Workmen's Compensation Bureau Harrisburg, Pa.

REFEREE'S AWARD OR DISALLOWANCE OF COMPENSATION.
Claim Petition No. 5722.Marie E. Polk Claimant vs. Philada. & Reading Ry. Co.
Defendant.Hearing held at #1115 North American Building,
Philada., Penna., on Tuesday, June 11th, 1918, at 10 A. M.,
at which there were present:—Mrs. Marie E. Polk, 3545 Janney Street, Philada., Penna.,
Claimant; Michael Hayes, Esq., Penn Square Bldg.,
Philada., Penna., Counsel for Claimant; andGeorge Gowen Parry, Esq., 133 South 12th Street,
Philada., Penna., Counsel for Defendant; and George S.
Whertley, 3240 West Huntingdon Street, Philada., Penna.,
Witness for Defendant.

FINDINGS OF FACT.

At the hearing the Claimant and Defendant agreed on the
following facts:—*First.*—On August 28th, 1917, neither John M. Polk nor
the Defendant had filed with the Workmen's Compensation
Bureau, nor served upon the other, notice of rejection of
Article III of the Workmen's Compensation Act of 1915,
in accordance with the provisions of said Act.*Second.*—On that date and for some time previous thereto,
John M. Polk was in the employ of the Defendant, whose
business was that of steam railway operator and whose
place of business was at Philadelphia, Penna., as a brake-
man;*Third.*—In said employment on that date his wages were
payable on an hourly basis and during so much of the six
months previous thereto as he worked for the Defendant

his average weekly wage, exclusive of overtime, was Nineteen Dollars and Eighty Cents (\$19.80) and was payable semi-monthly;

Fourth.—On that date John M. Polk while employed as a brakeman, on a freight train in the Port Richmond yard of the Defendant in Philada., Penna., handled by engine #832, was caught between two cars, and as a result thereof sustained certain injuries;

Fifth.—The Defendant had immediate knowledge of the occurrence of said injuries.

Sixth.—The Defendant furnished to John M. Polk proper and reasonable medical, surgical and hospital services, medicines and supplies, having him sent to the Episcopal Hospital, Philada.

Seventh.—John M. Polk died August 29th, 1917, as a result of the injury so sustained, and the Defendant had due knowledge of the death of John M. Polk, and that it resulted from the injuries aforesaid.

Eighth.—At the time of the occurrence of the injury the Defendant was a common carrier, by rail, engaged in both interstate and intrastate commerce.

The Referee finds the following additional facts:

First.—The expense of the last sickness and burial of John M. Polk exceeded One Hundred Dollars (\$100.00) none of which has been paid by the Defendant;

Second.—John M. Polk left to survive him the following dependents:

His widow—Marie E. Polk—who resided with him at the date of his death, and the following children—

John Polk, born December 8th, 1907,

Charles Polk, born April 12th, 1910,

George Polk, born April 12th, 1910,

Arthur Polk, born November 29th, 1915;

Third.—At the time of the occurrence of the injury there was a draft of freight cars attached to the engine which was in charge of the crew of which John M. Polk was a

member. Some of these cars were cars bound from points within the State of Pennsylvania to other points within the State of Pennsylvania, and the others were cars loaded with various commodities, some of which were bound from points outside the State of Pennsylvania to points within the State of Pennsylvania, and others, of which were bound from points within the State of Pennsylvania to points outside of the State of Pennsylvania, and there was at least one car of this draft of freight cars which was passing through Pennsylvania, from a point in New York to a point in Illinois.

It was contended by the Defendant that under these facts John M. Polk was at the time of the occurrence of the injury, engaged in performing duties incident to interstate commerce, and that, therefore, the Claimant was not entitled to compensation. It has been repeatedly held by the Workmen's Compensation Board, and by the Courts, that the burden of establishing the fact that an employe was at the time of the occurrence of the injury engaged in performing the duties incident to interstate commerce, is upon the Defendant, who alleges this fact. In the present case we are of opinion that the Defendant has failed to meet this burden of proof. The Defendant contended that having shown that the work of the decedent as a member of this crew was work incident to interstate commerce, they have established the fact that the decedent was at the time of the occurrence of the injury actually engaged in performing such duties, and that therefore the Defendant had met the burden required of it. The Defendant offered no testimony whatever to show what work John M. Polk was performing at the time that he was injured; the Defendant simply showed that the draft of cars constituting the train, under the control of the crew of which John M. Polk was a member, contained cars en route in the course of interstate journeys, but we feel that it might well be that while this train was standing on the tracks in the yard awaiting further orders to proceed, or even for some other reason that the conductor of the crew or some other superior of Polk's might have delegated him to perform some

duties for the Defendant which were not incident to nor necessary for the continuance of the interstate journey of the cars in this draft. The engine and crew were a yard engine and crew. The testimony shows that this crew had no duties to perform outside of the yard limits. We feel that, particularly with a crew of this sort, there may have been many things which this brakeman might have been delegated to perform while he was still a member of this crew and had in charge the cars shown by the Defendant to have been in this draft, entirely separate and apart from the movement of these cars, and of course in that case he would not have been at the time of the occurrence of the injury actually engaged in performing the duties incident to interstate commerce.

The Defendant further contended that since at the time of the occurrence of the injury the employe was a member of a crew having in charge interstate cars, necessarily he must have been performing some duty incident to those cars or else he would have been acting outside the course of his employment. In this we cannot agree. We feel that it is the duty of the Defendant to show just what the employe was doing at the time of the occurrence of the injury and thus establish by the weight of the evidence the fact that at the time of the occurrence of the injury the employe was actually engaged in work incident to interstate commerce; otherwise, the Referee could but guess as to what the employe was doing, and this, of course, he is not permitted to do. We are, therefore, of opinion that the Defendant had not met the burden of proving that at the time of the occurrence of the injury John M. Polk was actually engaged in duties incident to interstate commerce.

CONCLUSIONS OF LAW.

On August 28th, 1917, both John M. Polk and the Defendant were bound by the terms of Article III of the Workmen's Compensation Act of 1915.

The injury sustained by John M. Polk on that date while acting in the course of his employment with the Defendant was such an injury by accident as is contemplated by

Article III, Section 301, of said Act; and since the Defendant had immediate knowledge of the occurrence of injury; and since the death of John M. Polk resulted from said injuries, and the Defendant had due notice of his death and that it had so resulted; and since John M. Polk left to survive him a dependent widow and children; and since the Defendant had failed to meet the burden of proving that at the time of the occurrence of the accident John M. Polk was actually engaged in performing duties incident to interstate commerce,—the Claimants are entitled to compensation.

AWARD.

Under Article III, Section 307, compensation is awarded as follows:—

To Marie E. Polk, One Hundred Dollars (\$100.00) on account of the expenses of the last sickness and burial of John M. Polk and

Sixty Percent (60%) of the decedent's weekly wage of Nineteen Dollars and Eighty Cents (\$19.80) or Eleven Dollars and Eighty-eight Cents (\$11.88) per week, from August 29th, 1917, to May 29th, 1923; inclusive;

To the Guardian of John Polk, Charles Polk, George Polk and Arthur Polk, Forty-five Percent (45%) of decedent's weekly wage of Nineteen Dollars and Eighty Cents or Eight Dollars and Ninety-one Cents (\$8.91) per week, from May 30th, 1923, to December 7th, 1923, inclusive;

To the Guardian of Charles Polk, George Polk and Arthur Polk, Thirty-five Percent (35%) of decedent's weekly wage of Nineteen Dollars and Eighty Cents (\$19.80) or Six Dollars and Ninety-three Cents (\$6.93) per week, from December 8th, 1923, to April 11th, 1926, inclusive;

To the Guardian of Arthur Polk, Fifteen Percent (15%) of decedent's weekly wage of Nineteen Dollars and Eighty Cents (\$19.80) or Two Dollars and Ninety-seven Cents (\$2.97) per week, from April 12th, 1926, to November 28th, 1931, inclusive.

(Signed) GEO. C. KLAUDER,

Referee, First District.

PHILADA., PENNA., July 15, 1918.

DECISION OF THE WORKMEN'S COMPENSA-
TION BOARD.

MACKEY, Chairman.

The findings of fact and conclusions of law of the Referee are adopted by the Board and the award is affirmed.

HARRY A. MACKEY,
Chairman.

Concurred in by Commissioners Scott and Leech.
OCTOBER 3, 1918.

DECISION OF THE COURT OF COMMON PLEAS.

No opinion was filed by the Court, which entered the following decree:—

"Aug. 14, 1919. The appeal of the defendant is dismissed and judgment is directed to be entered in accordance with the award of the Referee and the Workmen's Compensation Board."



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In the Supreme Court of the United States.

OCTOBER TERM 1920. No. 298.

Philadelphia and Reading Railway Company, Petitioner,

vs.

Marie E. Polk, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
COMMONWEALTH OF PENNSYLVANIA

STATEMENT OF THE CASE.

The case comes before the Court on a writ of *Certiorari* issued to the Supreme Court for the Commonwealth of Pennsylvania to review a judgment of that Court, affirming a judgment of the Court of Common Pleas No. 5, of Philadelphia County, Pennsylvania, which affirmed an award of the Workmen's Compensation Board of Pennsylvania. The question involved may be stated as follows:

Is a brakeman engaged in interstate commerce while employed on a freight train containing cars bound from points without and within the State of Pennsylvania to points within and without the said State?

The record shows that Marie E. Polk filed a petition under the Pennsylvania Workmen's Compensation Act to recover compensation for the death of her husband, a brakeman in the freight service of the defendant railway company, who was crushed between two cars in a freight train which was being handled by the defendant's engine, No. 832. Polk was a member of the crew of this engine and was at work in the course of his employment on this train when he was hurt. The train contained a number of cars, some of which were moving and en route from points outside the State of Pennsylvania to points within and without the State, and others which had originated in the State and were bound to points outside of it. The engine and crew were concerned merely with moving the train through the defendant's Port Richmond Yard in Philadelphia, Pennsylvania, and their usual duties did not take them beyond the yard limits. (Referee's findings, Record pages 11, 12.)

The Compensation Referee, although incorporating in his findings of fact the agreement of the parties that "Polk was employed as a brakeman on a freight train in the Port Richmond Yard of the defendant in Philadelphia, Penna., handled by engine No. 832, was caught between two cars and as the result thereof sustained certain injuries," and finding further that this train contained a number of interstate cars, made an award of compensation to the claimant on the ground that "the defendant offered no testimony whatever to show what work John M. Polk was performing at the time he was injured" and therefore the defendant had not met the burden of proof that "Polk was actually engaged in duties incident to interstate commerce." (Referee's findings, Record pages 12, 13.)

The Workmen's Compensation Board of the State of Pennsylvania adopted the Referee's findings of fact and conclusions of law and affirmed the award. The Court of Common Pleas, upon appeal, directed judgment to be entered in accordance with the award of the Referee and the Workmen's Compensation Board and dismissed

the appeal. This judgment was affirmed by the Supreme Court of Pennsylvania on the ground that "the Referee found as a fact the appellant had failed to meet the burden of proof which rested upon it. His distinct finding was 'the defendant offered no testimony whatever to show what work John M. Polk was performing at the time he was injured:'" (Opinion, Record page 28.)

A petition for a writ of *certiorari* was filed in this Court and allowed.

SPECIFICATIONS OF ERROR.

I. The Supreme Court of Pennsylvania erred in affirming the judgment of the Court of Common Pleas No. 5 of Philadelphia County, State of Pennsylvania, for the respondent, whereby the petitioner was denied the right, privilege and immunity claimed by it under the Act of Congress of April 22, 1908, Chapter 149, 35 Stat. 65, commonly called the Federal Employers Liability Act. The decision of the Supreme Court of Pennsylvania is as follows:—

Per Curiam:

The defense set up by the appellant to the claim made by the appellee for compensation for the death of her husband is that at the time he received his injuries he was a brakeman in its employ in connection with its interstate commerce business. The referee found that he was an employee of the appellant on a freight train, in the Port Richmond yard, in Philadelphia, at the time of his injuries, which resulted in his death on August 29, 1917. There was no presumption as to the character of his employment. If it was in connection with interstate commerce, as is alleged by appellant, the burden was upon the latter to show that fact. *Hench vs. Pennsylvania Railroad Company*, 246 Pa. 1; *Murray vs. Pittsburgh, C., C. & St. L. Rail-*

road Company, 263 Pa. 398. The referee found as a fact that the appellant had failed to meet the burden of proof which rested upon it. His distinct finding was "the defendant offered no testimony whatever to show what work John M. Polk was performing at the time he was injured."

Appeal dismissed and award affirmed.

II. The Supreme Court of Pennsylvania erred in affirming the judgment of the Court of Common Pleas No. 5 of Philadelphia County, State of Pennsylvania for the respondent on the ground that "the defendant offered no testimony whatever to show what work John M. Polk was performing at the time he was injured" for it utterly ignores the facts established by the referee's fourth agreed finding, that he was actually employed as a brakeman on the train of engine No. 832 when he was injured by being caught between two cars, and by the third additional finding that the train was an interstate train and was under the control of the crew of which John M. Polk was a member, who had in charge the cars shown by the defendant to have been in the train. The said findings of the Referee are as follows:—

"Fourth.—On that date John M. Polk while employed as a brakeman on a freight train in the Port Richmond Yard of the defendant in Phila., Penna., handled by engine #832, was caught between two cars, and as a result thereof sustained certain injuries.

"Third.—At the time of the occurrence of the injury there was a draft of freight cars attached to the engine which was in charge of the crew of which John M. Polk was a member. Some of these cars were cars bound from points within the State of Pennsylvania to other points within the State of Pennsylvania, and the others were cars loaded with various commodities, some of which were bound from points outside the State of Pennsylvania to points within the State of Pennsylvania, and others of which were bound from

points within the State of Pennsylvania to points outside of the State of Pennsylvania, and there was at least one car of this draft of freight cars which was passing through Pennsylvania, from a point in New York to a point in Illinois.

"The defendant offered no testimony to show what work John M. Polk was performing at the time that he was injured; the defendant simply showed that *the draft of cars constituting the train, under the control of the crew of which John M. Polk was a member, contained cars enroute in the course of interstate journeys,* but we feel that it might well be that while this train was standing on the tracks in the yard awaiting further orders to proceed, or even for some other reason that the conductor of the crew or some other superior of Polk's might have delegated him to perform some duties for the defendant which were not incident to nor necessary for the continuance of the interstate journey of the cars in this draft. The engine and crew were a yard engine and crew. The testimony shows that this crew had no duties to perform outside of the yard limits. We feel that, particularly with a crew of this sort, there may have been many things which this brakeman might have been delegated to perform while *he was still a member of this crew and had in charge the cars shown by the defendant to have been in this draft,* entirely separate and apart from the movement of these cars, and of course in that case he would not have been at the time of the occurrence of the injury actually engaged in performing the duties incident to interstate commerce."

III. The Supreme Court of Pennsylvania erred in affirming the judgment of the Court below in favor of the respondent because by that decision it affirmed the award of the Workmen's Compensation Board, based upon a finding that the decedent was engaged in intrastate commerce which finding was contrary to the evidence.

- IV. The Supreme Court of Pennsylvania erred in holding that since there was no presumption as to the character of the employment the burden was upon the petitioner to show that it was in connection with interstate commerce, because there was no proof by the respondent tending to show an engaging in intrastate commerce. (The decision of the Supreme Court of Pennsylvania is set out in full as part of the first specification.)

BRIEF OF ARGUMENT.

The question involved in this case is of great importance not only to interstate carriers by railroad, and the employees of such carriers engaged in interstate commerce, but to those persons engaged in the trial of cases under the Federal Employers' Liability Act, and the Workmen's Compensation Act of Pennsylvania.

Is a brakeman engaged in interstate commerce while employed on a freight train containing cars bound from points without and within the State of Pennsylvania to points within and without the said State?

The answer to this question is not far to seek. It is settled beyond argument that a train containing cars bound from a point in one State to a point in another State, or shipments so consigned, is an interstate train, and those employed in moving or facilitating the movement of such cars or shipments are engaged in interstate commerce. This is true when such employee's duties are exclusively performed within the boundaries of a State.

In N. P. Ry. vs. State of Washington, 222 U. S. 370, at 375, Chief Justice White said:—

"The train though moving from one point to another in the State of Washington, was hauling merchandise from points outside the State destined to points within the State and from points within

the State to points in British Columbia. This transportation was interstate commerce, and the train was an interstate train, despite the fact that it may also have been carrying some local freight. In view of the unity and indivisibility of the service of the train crew, and the paramount character of the authority of Congress to regulate commerce, the Act of Congress was exclusively controlling." *Sou. Ry. vs. U. S.*, 222 U. S. 20.

To the same effect are **New York Central and Hudson River R. R. Co. vs. Carr**, 238 U. S. 260; **Philadelphia and Reading Railway Company vs. Hancock**, 253 U. S. 284; **Waters vs. Guile**, 234 Fed. Rep. 532. We proceed then to consider whether the character of the train in question brings the case within the scope of these authorities.

Of this there does not seem to be the slightest room for doubt. The Referee, whose findings were adopted and affirmed by the Compensation Board, said in his third additional finding of fact:—"At the time of the occurrence of the injury there was a draft of freight cars attached to the engine which was in charge of the crew of which John M. Polk was a member. Some of these cars were bound from points within the State of Pennsylvania to other points within the State of Pennsylvania, and the others were cars loaded with various commodities, some of which were bound from points outside the State of Pennsylvania to points within the State of Pennsylvania and others of which were bound from points within the State of Pennsylvania to points outside of the State of Pennsylvania, and there was at least one car of this draft of freight cars which was passing through Pennsylvania from a point in New York to a point in Illinois."

(Referee's findings, Record, page 12).

And in the fourth agreed finding of fact the Referee said:—

"John M. Polk while employed as a brakeman, on a freight train in the Port Richmond Yard of the defendant in Philada., Penna., handled by engine # 832, was caught between two cars, and as a result thereof sustained certain injuries." (Referee's findings, Record, page 11).

The findings when read together can only mean that Polk was a brakeman on the crew of engine 832; that while he was working on an interstate train handled by and attached to engine 832 he was caught between two of the cars in that train and injured.

It would seem that the claimant's decedent was injured while engaged in interstate commerce within the meaning of the Federal Employers' Liability Act and that any right of action growing out of his death resulting from the said injury must be based upon the said Act and not upon the Workmen's Compensation Act of Pennsylvania.

The Compensation Referee made an award of compensation to the claimant for reasons which appear to us to be altogether frivolous. It is clear that no doubt was entertained that Polk was at work on an interstate train, but the Referee sought to evade the legal conclusion that this constituted an employment in interstate commerce, by asserting that the defendant below had failed to meet the burden of proof because it did not by testimony specifically exclude every conceivable task, unrelated to interstate commerce, either on or off the train, that a brakeman might perform if ordered to. We did not think it lay in human ingenuity or perversity to imagine or impose such a test. And if there ever was such a rule of law what reason had the defendant to call witnesses to exclude a mere possibility which had already been excluded by an established fact to the contrary.

It appears from the award that the claimant came to the hearing without witnesses in her behalf. It was clear that she could not make out a *prima facie* case unless she proved that her husband was at work when injured, so

the defense had only called witnesses to prove the character of the train in question, if it was put to proof at all. The claimant herself could prove nothing but dependency and funeral expenses and unless the defense agreed to admit other facts essential to her proof the case could not go on. At the request of the Referee, the defense agreed that Polk was working in the course of his employment as a brakeman on the train hauled by engine 832 and that while so employed he was crushed between two of the cars. This agreement the Referee undertook to incorporate and did incorporate in his findings of fact. (Referee's findings, Record, page 11).

In view then of the agreement and findings it is difficult to treat seriously the learned Referee's critical and elaborate discussion to reach the conclusion that there is no proof of what Polk was doing when he was hurt. True there is nothing in the findings to show whether he was applying a brake, coupling an air hose, signalling the engineman or the like, but this we submit is utterly immaterial, for if the finding had been, as averred in the petition, that Polk was making a coupling, it could have had no greater effect than to support the inference that he was employed in doing a brakeman's work. Now it is established as an undisputed fact that he was employed in the performance of his duties, in the course of his employment as a brakeman on this interstate train and the ruling of the Referee is reduced to this: *Although it is agreed that a man was employed in the performance of his duties as a brakeman on a certain train, it is, nevertheless essential to prove the performance of a particular task to support the inference agreed upon.*

To state this proposition is to condemn it.

The Supreme Court of Pennsylvania affirmed the award upon the ground that "The Referee found as a fact that the appellant (your petitioner) had failed to meet the burden of proof which rested upon it. His distinct finding was "the defendant offered no testimony whatever to show what work John M. Polk was performing at the time he was injured." This, it is submitted was error,

for it altogether ignores the specific findings of the Referee that Polk was doing a brakeman's work on an interstate train. If the Referee's findings were conclusive upon the learned Court below, it is clear that one finding could not be more conclusive than another, yet the essential finding of fact is ignored by the Court to fasten upon one that is altogether immaterial.

It must also be clear that the proof for the defendant which the Supreme Court of Pennsylvania finds to be insufficient rests on exactly the same basis as the proof for the claimant. By the word "testimony" we presume we are to understand the statement of a witness under oath, and while it is true that no witness was called by the defendant to show the nature of Polk's work, it is equally true that no witness was called by the claimant to show that he was at work at all. We do not think the question of the burden of proof is here involved at all; for when the parties to the action agreed that claimant's decedent was working on a particular train it was surely unnecessary to call witnesses to prove it. To argue this question is to quibble over words; a fact agreed upon in no way differs from a proven fact; it is established beyond cavil.

In the face then, of the specific finding that Polk was at work, in the course of his employment, as a brakeman on an interstate train; the finding that the defendant called no witness to show what work he was doing is, we submit, immaterial.

It seems scarcely necessary to point out that there was no burden upon the defendant to do anything until the claimant proved facts to support a conclusion that her decedent was within the Compensation Act. If the claimant be deemed to have sustained the burden of proof by the finding that the decedent was employed as a brakeman on a particular train when he was injured, then, if there was any burden on the defendant to show the character of the employment, it must be deemed to have sustained it by the finding that Polk was employed as a brakeman on an interstate train.

In his award affirmed by the Supreme Court of Pennsylvania, the Referee said:—

"We feel that it might well be that while this train was standing on the tracks in the yard awaiting further orders to proceed or even for some other reason that the conductor of the crew or some other superior of Polk's might have delegated him to perform some duties for the defendant which were not incident to or necessary for the continuance of the interstate journey of the cars in this draft. The engine and crew were a yard engine and crew. The testimony shows that this crew had no duties to perform outside of the yard limits. We feel that, particularly with a crew of this sort, there may have been many things which this brakeman might have been delegated to perform while he was still a member of this crew and had in charge the cars shown by the defendant to have been in this draft, entirely separate and apart from the movement of these cars, and of course in that case he would not have been at the time of the occurrence of the injury actually engaged in performing the duties incident to interstate commerce."

(Referee's findings, Record page 15.)

This is no more than idle speculation. In the first place there is no finding that Polk was delegated by anybody to perform any duties incident to intrastate commerce, or, as the Referee put it, "entirely separate and apart from the movement of these cars." Yet the award is based flatly on the ground that the defendant failed to exclude by testimony some such possibility. It would seem, therefore, that the judgment has no foundation of fact on which to rest.

In Louisville and Nashville R. R. vs. Finn, 235 U. S. 601, the Court said:—

"It has repeatedly been held by this Court that an administrative order made indisputably contrary to the evidence or without any evidence, must be deemed arbitrary, and therefore subject to be set aside."

This Court has also repeatedly held that a Federal right is denied by the result of a finding without evidence to support it. **N. P. R. R. vs. North Dakota**, 236 U. S. 585; **K. C. So. Ry. vs. Albers**, 223 U. S. 573; **Mackay vs. Dillon**, 4 Howard 421; **Dower vs. Richards**, 151 U. S. 658; **Stanley vs. Schwalby**, 162 U. S. 255. Here after an express finding that Polk, when injured, was working as a brakeman on the train, the conclusion is reached that there is no proof that he was not doing some other work, and in consequence it is presumed that he was employed in some task incident to intrastate commerce. The denial of due process of law would seem to be involved by a judgment against the appellant without finding of fact to support it.

Respectfully submitted.

GEORGE GOWEN PARRY,

Counsel for Petitioner.



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JAMES D. HANER

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No. 200.

October Term, 1920.

SUPREME COURT OF THE UNITED STATES

**PHILADELPHIA AND READING RAILWAY
COMPANY,**

Petitioner,

vs.

MARK E. FOLK,

Respondent.

**On Writ of Certiorari to the Supreme Court of
Pennsylvania.**

BRIEF FOR RESPONDENT.

PAUL H. MOORE,

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500 Penn Square Bldg.,

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IN THE
Supreme Court of the United States.

October Term, 1920. No. 298.

PHILADELPHIA AND READING RAILWAY
COMPANY,

Petitioner,

vs.

MARIE E. POLK,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE COMMONWEALTH OF PENN-
SYLVANIA.

COUNTER STATEMENT OF THE CASE.

The questions involved are as follows:

In an action between two citizens of the State of
Pennsylvania,

(1) Will this Court review findings of facts made
by a competent tribunal and successively affirmed by
three appellate tribunals of the State of Pennsylvania
when the evidence is not a part of the Record and the

Pennsylvania Statute makes the decision as to fact final and not reviewable?

(2) Where decedent, at the time of the injury, was a member of a yard crew which worked exclusively within (but upon and over all the tracks in) a certain freight yard of defendant company, located within the City of Philadelphia, State of Pennsylvania, and where neither (a) the nature of the duties of decedent; (b) the location in the yard where he was injured; (c) upon what tracks he was injured; (d) what train it was that actually caused the injury; nor (e) what duties decedent was actually performing at the time of the accident, were shown by the evidence.

Can it be decided as a matter of law that the decedent was engaged in interstate traffic at the time of the injury, simply because the engine which worked with the crew, of which he was a member, was attached to a draft of cars (including at least one car in interstate commerce) which was at the time standing on one of the tracks in the freight yard?

(3) Is not the burden of proving a fact upon the party who asserts it?

The parties to the cause are Marie E. Polk, a citizen of the State of Pennsylvania, and the Philadelphia and Reading Railway Company, a corporation, incorporated under the laws of the State of Pennsylvania, and the occurrence which is the subject of the suit happened exclusively within the County of Philadelphia, and State of Pennsylvania.

The action was a compensation claim filed by a widow and children under the Pennsylvania Compensation Law, to wit, the Act of June 2, 1915, of Pennsylvania Pamphlet Laws, 1915, page 736, etc. The Act

provides in Section 302a that the employer and employee, or both, may by appropriate action decline to have the Act apply to their relationship, but in the absence of such declination, the Act is applicable, to employers and employes throughout the state.

On August 28th, 1917, between 10.00 and 11.00 o'clock P. M., John M. Polk, who was the husband of Marie E. Polk, was injured while working in the "Port Richmond" yard of the railroad company, in Philadelphia, Pennsylvania, and died from the injuries the next day.

The decedent was a **yard** brakeman, a member of a crew which, on the night of the occurrence was working in conjunction with a certain yard engine. At the time he was injured that engine was attached to a "draft" of cars, which "draft" contained one or more cars containing interstate commerce, but this "draft" of cars was then **standing** on one of the tracks in the railroad company yard. The reason for this "draft", or any of the cars being in the yard, was not shown, nor was it shown whether the engine was attached in order to shift the cars onto the different tracks in the yard, or to take out some of the cars, or add others. As a matter of fact just what was to be done with the cars or any of them was not shown, but it was clearly established that the yard crew had no duties to perform outside the yard.

What the decedent was doing at the time of the accident; by what train, or what cars he was injured; or on what tracks within the yard he was injured, was not shown.

The case was duly heard before a Referee of the Workmen's Compensation Board of Pennsylvania. At the hearing the defendant admitted on the record that at the time of the accident the decedent was a brake-

man in its employ, and stated that, while so employed, he was "caught between two cars," and sustained injuries, from which he died one day later (p. 11, Transcript of Record.)

The Referee of the Compensation Board, having heard, investigated and considered the matter, made certain findings of fact and conclusions of law, and made an award in favor of Mrs. Polk and against the Railroad Company.

From this award, the defendant company appealed successively to the Workmen's Compensation Board; Court of Common Pleas No. 5, of Philadelphia County, Pennsylvania, and to the Supreme Court of Pennsylvania; and all these tribunals affirmed the award of the Referee, and thereupon this appeal was taken to this Court.

BRIEF OF ARGUMENT.

A reading of the Appellant's Paper Book will show that the real thing which it is asking the Court to do, is to reverse and set aside the **findings of fact** made by the Compensation Referee, and this, without considering the evidence and proofs, upon which the findings of fact were based. This, notwithstanding the fact that the Pennsylvania law, applicable to the matter (Act of June 2, 1915, P. L. 736) provides, *inter alia*, as follows:

"Section 409. A Referee's finding of fact, shall be final, unless the Board shall allow an appeal therefrom as hereinafter provided. The Board's finding of fact shall in all cases be final.

From the Referee's decision on any question of law an appeal may be taken to the Board, and from any decision of the Board on a question of law an appeal may be taken to the Court as hereinafter provided."

"Section 428. Neither the Board nor any Referee shall be bound by the technical rules of evidence in conducting any hearing or investigation."

"Section 417. The Referee, if he shall deem it necessary, shall, either before or after any hearing, make an investigation of the facts set forth in the Petition or cause the same to be made."

"Section 421. " The Board shall at all times have the power to make any investigation which it shall deem necessary to ascertain the facts."

This Act had been voluntarily accepted by the Railroad Company, which agreed to be bound by all its provisions.

This Court has frequently decided that legislation such as the Pennsylvania Compensation Law is constitutional.

New York Central R. Co. v. White, 243 U. S. 188;

Hawkins v. Bleakly, 243 U. S. 210;

Mountain Timber Co. v. State of Washington, 243 U. S. 219.

The Pennsylvania Supreme Court has steadily ruled that upon appeal the Referee's findings of fact are conclusive and that the evidence and proofs, upon which such findings are made, are not reviewable by the Courts.

McCauley v. Woolen Co., 261 Pa. 312.

The Pennsylvania Law provides (Sec. 413) that unless an answer be filed to a compensation claim within seven days, of receipt of notice from the Compensation Board, the allegations of the petition shall be deemed to be true.

An answer was filed in this case (p. 9, Transcript of Record), and in it the Railroad Company denied many of the averments of the claim petition and also **set up** an additional affirmative defense in the following language.

(P. 9, Transcript of Record):

"3. The defendant denies that he is liable to pay compensation under the facts alleged in the claim petition, for the following reasons, because claimant's decedent and defendant were engaged in interstate commerce at the time the former was injured."

We feel that under the decisions of this Court,

Osborne v. Gray, 241 U. S. 16,

as well as under the Pennsylvania decisions,

Hench v. Ry., 246 Pa. 1,

and the general rules of evidence, the burden of proving this affirmative defense was upon the railroad company, which asserted it, and the question whether such fact was proven was a **question of fact** to be decided exclusively by the referee (Par. 409, Pennsylvania Act), such decision, however, being subject to a discretionary power of review in the Compensation Board (See Sec. 421, Penna.).

The evidence is not a part of the record, and is not reviewable.

McCauley v. Woolen Co., 261 Pa. 312.

It is to be remembered also that the act provides that neither the Board, nor the Referee is bound by **technical** rules of evidence (Sec. 428).

In addition to proof by witness, and other evidence, the Act authorizes the Referee (Sec. 417) and

the Compensation Board (Sec. 421) to make any further investigation they deemed necessary.

Under the circumstances we contend that the decision of the Referee, **as to facts**, implies that he has fully considered the evidence, and has, himself, made such personal investigation, **as to facts** which he deemed important and his **findings of fact**, having been approved by the Compensation Board (p. 20, Transcript of Record), are binding and conclusive, and not reviewable, yet practically the whole of appellant's argument is a contention that the referee erred in his **findings of fact**.

The only finding of law, which can possibly be held to be covered by appellant's Assignment of Error, is in the following language: (p. 14, Transcript of Record).

"And since the defendant has failed to meet the burden of proving that at the time of the occurrence of the accident, John M. Polk was actually engaged in performing duties incident to interstate commerce—the claimants are entitled to compensation."

This "Conclusion of Law" followed a finding of fact" on the same subject matter, to wit, (p. 13, Transcript of Record):

"That the defendant had not met the burden of proving that at the time of the occurrence of the injury, John M. Polk was actually engaged in duties incident to interstate commerce."

In our judgment the first three specifications of error, filed by the appellant and practically all of its argument deal with these questions of fact. As a matter of fact, the third assignment (p. 5, Appellant's Paper Book) frankly admits that the affirmance of it would

necessitate this Court's passing upon evidence (which is not in the record) and the "**conclusions of fact**" and this, although the Pennsylvania Act provides in Section 409 (p. 751, Penna. P. L. 1915), that the Referee's findings of fact are final, and the Pennsylvania Supreme Court has ruled evidence not part of record and not reviewable.

McCauley v. Woolen Co., 261 Pa. 312.

The appellant has, however, argued the matter so fully in its paper book that we feel that it may not be amiss to make reply thereto on the merits.

The proceedings were begun by filing a claim petition on May 9, 1918 (pp. 5 and 6, Transcript of Record), wherein it was alleged, inter alia: (1) That the decedent died on August 29, 1917, as the result of an accident occurring in the course of his employment; (8) that at the time of the accident, the decedent was coupling cars in the railroad yard; (9) that he was crushed between cars while coupling them in the yard; (12) that the occupation of the decedent at the time of the injury was that of a brakeman, and that his employer was the Railroad Company.

In the answer, filed by the Railroad Company, which was sworn to by one of its representatives on June 6, 1918, (p. 9, Transcript of Record), it denied all these averments.

When the matter came on for hearing before the Referee on June 11, 1918, the Railroad Company, through its attorney, stated on the record that it agreed that on the day of the accident the decedent was working for the railroad company, and was injured while at his work, and that he died the day following as a consequence of the injuries so received (pp. 11 and 12, Transcript of Record). It also admitted that it had

not rejected the compensation act (see 1st Finding of Fact p. 11 Transcript of Record) and so *prima facie* was subject to its provisions.

After such statement had been made by its counsel and duly spread upon the record, the attorney for the railroad company called at least one witness to testify (p. 13 Transcript of Record). The evidence given by the witness is not shown in the record, but the findings of the referee, both of fact and of law, do appear (pp. 11, 12, 13 and 14, Transcript of Record), and an inspection of the "findings of fact" will show that the facts agreed to by the railroad company; the testimony given by the witness and, it may be, the Referee's own investigation were all considered by him, as was the fact that while the railroad company, in its answer to the claim petition (p. 9, Transcript of Record) had set up as an affirmative defense, to wit: that the parties were, at the time, engaged in interstate commerce, it had not produced evidence to prove it.

The record here, may or may not show the exact words used by the attorney for the railroad company in stating what facts he agreed to, but the petitioner here admits (p. 9, Petitioner's Brief) that they are incorporated in the referee's findings of fact.

On page 16 of its paper book, filed in the Supreme Court of the State of Pennsylvania—a copy of which is attached to the petition for certiorari, filed in this Court—petitioner states as a fact (with which it was familiar) that it was customary for compensation referees to endeavor to secure from parties an agreement on matters "as to which there is no real dispute, supplementing them by taking testimony upon matters either in dispute, or upon which one of the parties had no knowledge that would justify an admission."

On pp. 8 and 9, its brief here, petitioner argues

that claimant at the time of trial did not have sufficient facts in her possession, or witnesses to testify for her, to make out a prima facie case; but we do not agree with this statement. Under the Pennsylvania law, the claimant was not required to prove the details of the accident, and so it is evident that when prior to the hearing, counsel for petitioner was advised that counsel for the railroad company would admit facts sufficient to make out a prima facie case, it was not necessary for the claimant to produce witnesses to prove the same thing.

Among the facts admitted before the referee was the following:

“5th. The defendant company had immediate knowledge of the occurrence of said injury.”

Yet it did not produce witnesses or evidence to show just what did happen or to prove its affirmative defense. Finally, however, in a pleading, filed of record in the Pennsylvania Supreme Court, on February 10th, 1920, (p. 30, Transcript of Record), the Railroad Company admitted that it could have produced evidence had it desired to do so, for it says inter alia (p. 30, Transcript of Record) that it, the Railroad Company “was at the time of the hearing before the referee and still is able to prove the exact nature of the work that Polk was engaged in at the time of the accident.”

The significance of this statement becomes evident when it is remembered that the Employer's Liability Act of the United States—to which the Railroad Company is now apparently desirous of sending this claimant for relief—fixes a limitation of two years for the commencement of suit, and the two years expired on August 28, 1919, ~~at~~ about six months prior to the date that the pleading was filed in which the statement

as to its having such evidence was made (pp. 30 and 31, Transcript of Record).

It is to be borne in mind that the railroad company in the answer which it filed at the inception of the proceedings, and which was supported by the oath of one of its officials (see p. 9, Transcript of Record) denied several of the paragraphs of the complaint, which seemed to say that the decedent was killed while in the performance of his customary duties, and it will be noticed that the language used by the company's attorney in stating the facts which constitute the fourth agreed finding of fact (p. 11, Transcript of Record) was cautious, to say the least. He very carefully refrained from saying that the decedent was injured by any particular train, or at any particular place in the freight yard, or in any particular manner, or what kind of operation of any trains was being performed at the time the decedent was injured. As a matter of fact, if the language used had said that decedent was engaged in interstate commerce, claimant would not have agreed to it.

The language used by the petitioner's attorney in making the admission is as follows: (p. 11, Transcript of Record)

"4th. On that date, John M. Polk, while employed as a brakeman on a freight train in the Port Richmond yard of the defendant in Philadelphia, Pennsylvania, handled by Engine No. 832, was caught between two cars, and as a result thereof sustained certain injuries."

Petitioner said "employed as a brakeman", but did not say actually working as a brakeman, nor which, if any, of a brakeman's duties he was performing, nor that he was performing any of the customary duties of a brakeman at the time of the accident.

So also, the language used was "on a freight train in the Port Richmond yard of the defendant in Philadelphia, Pennsylvania, **handled** by engine No. 832."

There is not one word to say **when** the freight train had been **handled** by engine No. 832, and certainly none to say that it was being handled **at the time** that the occurrence happened, or that the "handling" of that particular train resulted in any injury to Mr. Polk.

Again, the language used "was caught between two cars, and as a result thereof, sustained certain injuries." It was not stated that the "two cars", between which it was said the decedent had been caught, were a part of a freight train then being handled by, or then attached to, engine No. 832, nor even that the "two cars" were a part of any train that had **at any time** been handled by engine No. 832.

While a witness was thereafter called, he did not attempt to show what was meant by "while 'employed' as a brakeman on a freight train." nor by "handled by engine No. 832", nor by "between two cars", but offered evidence merely to show that at the time the accident happened there "was a draft of freight cars attached to the engine, which was in charge of the crew of which John M. Polk was a member" (p. 12, Transcript of Record), but "this train was **standing** on the tracks in the yard" (p. 13, Transcript of Record).

The railroad company did not call any witness, nor attempt to prove what work John M. Polk was actually performing at the time he was injured (p. 13, Transcript of Record). It is admitted that the engine and crew were **a yard engine** and crew, and that they **had no duties to perform outside the yard limits** (p. 13, Transcript of Record).

With the sworn answer of the railroad company denying the averments of the claim petition before him, and with the carefully couched language stated by attorney for the railroad (p. 11, Transcript of Record) and the carefully restricted testimony offered by the railroad company fresh in his mind, the learned referee found, and decided, that it had not been proved that the decedent was engaged in interstate commerce at the time the occurrence happened, and we feel that in so deciding he arrived at the only conclusion possible under the record and evidence.

At any rate, it was a proper subject for a conclusion of fact, and all the facts necessary to a finding were decided against the railroad company by the referee, who was successively affirmed by the full Workmen's Compensation Board, by the Court of Common Pleas No. 5 of Philadelphia County, and finally by the Supreme Court of the State of Pennsylvania.

The testimony taken before the referee is not a part of the record and is not reviewable on appeal.

See:

McCauley vs. Imperial Wool Co., 261 Pa. 312.

It may well be that either by evidence or by personal investigation the referee was made acquainted with the physical situation that existed in the Port Richmond yard of the railroad company in Philadelphia, Pennsylvania, in which the accident happened.

It is a matter of common knowledge in Philadelphia that the railroad yard in question consists of many tracks, and a number of railroad buildings used for railroad purposes, and in the railroad yard there are always a large number of cars being shifted to and fro. Many cars when they reach this yard have reached their final destination, with the exception of the pos-

sible necessity of shifting them about within the yard, for purposes of convenience. Cars in the yard are constantly being made up into trains or drafts, to be sent to shop for repairs, or to be taken out of the yard, either loaded or empty. Most of these operations are not interstate.

It is conceded that the decedent was a member of a "yard crew", and that his crew had no duties to perform outside of the yard limits (p. 13, Transcript of Record). The ordinary duties of such an employee are numerous and diverse, the following being typical: tending switches and lights; sealing and opening of car doors; keeping of the yards in good order; inspection and tests of cars; signaling; connecting and disconnecting couplings, brakes, hoses, etc. His duties relate not to a "draft" of cars, at any particular instant attached to a particular locomotive, but also to all cars within the yard which the crew, of which he is a member, has "handled" at any time during that night, or which it has orders to "handle" at any time later the same night. His duties take him anywhere within the yard; to any track, and to any car or cars, located at any point within the yard. In addition, it is well known that the duties of such an employee requires him to go for and deliver train orders or other orders, which relate to any cars handled, or to be handled; to locate cars anywhere within the yard; to get way bills and cards, and to deliver same when and where directed, and to assist his conductor, the yard master and train master in any matter or in any manner, **which they direct him to do**, and even though he is a "member of a yard crew" his duties may be changed at any instant by any of these superiors.

Such duties must of necessity take him to practically every portion of the railroad yard, and within the

railroad yard it may well be that at all times there are other yard engines, and crews and other **intrastate** trains and crews, working at the same time, and so, it may well be that, at the moment of the accident, the decedent had been directed to perform duties in conjunction with any of these various things, and he may have been injured by any cars, upon any track, and by any crew within the yard. **Much of the traffic within the yard was admittedly not interstate** (p. 12, Transcript of Record).

In view of all these facts, we do not see how it can be said, **as a matter of law**, that the learned referee erred in arriving at his **conclusions of fact**.

Under the circumstances, we feel that it is idle for the railroad company to argue that the referee was not justified in his **conclusions of fact**, and in deciding that it, the railroad company, had not shown that the decedent was, at the time of the occurrence, engaged in interstate commerce. The question of interstate commerce was a matter of affirmative defense, raised by the railroad company in its answer to claimant's petition (p. 9, Transcript of Record), and having been thus raised by defendant, the burden was upon the defendant to prove it, and this it totally failed to do.

Osborne v. Gray, 241 U. S. 16 (p. 21):

"It is apparent that there was no evidence requiring the conclusion that the deceased was engaged in interstate commerce at the time of his injury, and we are asked to supply the deficiency by taking judicial notice that the cars came from without the State. This contention we are unable to sustain. The make-up of trains and the movement of cars are not matters which we may assume to know without evidence. * * * The defendants knew the actual movement of the cars, and, failing to inform the Court upon this point, cannot complain that they have been deprived of a Federal right."

We feel that it is significant that while the company has raised the question as to the burden of proof by its specification of error, it has not cited any authority thereon, and has not really dealt with it in its argument.

The railroad company before the referee did not suggest that it had any other witnesses, nor that it knew of any other evidence which could be produced to more fully explain the occurrence. As a matter of fact, it was not until **February 10, 1920**, that it asserted that it "was at the time of the hearing before the referee and still is able to prove the exact nature of the work that Polk was engaged in at the time of the accident" (p. 30, Transcript of Record). When it is remembered that the Employers' Liability Act of the United States fixes a limitation of two years as the time for bringing suit, and when it is further remembered that this statement was first made by the railroad company **two years and six months** after the happening of the occurrence, it is obvious that the complainant would be irreparably hurt by an order of this Court opening the record and permitting the taking of any further testimony at this time.

DISCUSSION OF PETITIONER'S BRIEF.

In its brief the railroad company has distorted the facts and stated them to suit its own case. We have argued them at full length in this brief and will not further discuss them, except to point them out specifically.

Thus, in the statement of the question involved, it uses the words "freight train". The referee used the words "train" and "draft" indiscriminately. Surely there is no magic in the use of the word "train". There is no finding that it was routed as a "train" any-

where. The railroad company is merely asking this Court to find a particular fact. If there had been any question as to the meaning of the word "train" as distinguished from "draft", the remedy of the railroad company would have been a request for a hearing de novo, or new trial. This matter, of course, will not be considered by this Court.

Martineau v. Fairbanks, 112 U. S. 670.

At page 2 of its brief it uses the following language:

"crushed between two cars in a freight train."

"was at work in the course of his employment on this train."

"The engine and crew were concerned merely with moving this train through defendant's yard."

There is no finding of fact showing how Polk was injured and what "two cars" crushed him.

There is no finding that the yard engine and crew would move this "train" or "draft" anywhere.

There is no finding that it was made up as a train; whether it was to be moved about the yard for convenience; or whether it was in the process of being made up or broken up.

In its second assignment of error it says that Polk "was **actually** employed as a brakeman on the train. * * *

"The third additional finding that the train was an interstate train."

These are new facts injected by the railroad company, at this time, and are directly contrary to the findings of fact in this case.

Page 9 of its argument, it states that it was established as an "undisputed fact that he was employed in the performance of his duties, in the course of his employment as a brakeman on this interstate train." This is directly contrary to the finding of the referee, and is merely an effort on the part of the railroad company to distort the facts, and now arrange them to suit its case.

CONCLUSION.

This case has been seriously considered by four tribunals of the State of Pennsylvania, and the law of the case has never been in dispute. It is the law laid down by this Court in the case of

Illinois Central Ry. v. Behrens, 233 U. S. 473.

In which case, this Court determined that the employer's Liability Act of the United States applied (p. 478):

"Only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce. The true test always is: Is the work in question a part of the interstate commerce, in which the carrier is engaged."

If there had been any question as to the meaning of the words used by the referee, the railroad company had a complete remedy before the Compensation Board. It chose to rest its case on the question of law, to-wit, that it was not required to furnish evidence to prove its affirmative defense, and this question has been decided against it throughout all the Pennsylvania tribunals.

It is, therefore, submitted that the judgment of the Supreme Court of Pennsylvania should be affirmed.

FRANCIS M. McADAMS,
Attorney for Respondent.

PHILADELPHIA & READING RAILWAY COMPANY v. POLK.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 298. Argued April 28, 1931.—Decided May 16, 1931.

In a proceeding under a state workmen's compensation law to recover for the death of a railroad employee, findings that, when injured, he was employed as a member of a crew in charge of a draft of freight cars attached to an engine in a yard and containing both interstate and intrastate cars and freight, establish his employment in interstate commerce; a special relation to the intrastate commerce which would have rendered his employment intrastate cannot be presumed but must be proven by the actor in the proceeding. *Philadelphia & Reading Ry. Co. v. Di Donato, ante*, 327. P. 333. 266 Pa. St. 336, reversed.

THE case is stated in the opinion.

Mr. George Gowen Parry for petitioner.

Mr. Francis M. McAdams for respondent.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Certiorari to review a judgment of the Supreme Court of the State of Pennsylvania affirming an award made under the Workmen's Compensation Board of the State in favor of respondent who is the widow of John M. Polk, who died as the result of an accident, occurring in the course of his employment by the Railway Company.

The matter of her petition proceeded in due course from the referee of the Board to the Board, from the latter to the Court of Common Pleas, and thence to the Supreme Court of the State, she being adjudged by all of them: en-

titled to an award under the Workmen's Compensation Act of the State.

The facts as found are that Polk on August 28, 1917, while employed by the Railway Company on a freight train, in its Port Richmond Yard, handled by engine No. 832, was caught between two cars, and as a result thereof sustained injuries from which he died.

At the time of the occurrence of the injury the Company was a common carrier, by rail, engaged in interstate and intrastate commerce, and at such time there was a draft of freight cars attached to the engine which was in charge of the crew of which Polk was a member. Some of these cars were bound from points within the State to other points within the State and the others were loaded with various commodities, some of which were bound from points outside of the State to points within the State and others of which were bound from points within the State to points outside of the State, and there was at least one car of this draft which was passing through the State from a point in New York to a point in Illinois.

The Board, upon the appeal of the Company, adopted the findings of fact and conclusions of law of the referee and affirmed his award. This action was affirmed by the Court of Common Pleas and the latter's judgment by the Supreme Court.

The referee did not find definitely as a fact that Polk was engaged in intrastate commerce at the time of his injury, but assumed that the fact might be so, therefore, regarded it as so, because, in his opinion the burden of proving the contrary, that is, that Polk "was actually engaged in duties incident to interstate commerce," was upon the Company and the Company had "not met the burden required of it," and further, that the Company "offered no testimony whatever to show what work John M. Polk was performing at the time he was injured; . . ."

The Supreme Court approved the findings and the

deductions from them. It is manifest therefore that the case is within the rule of *Philadelphia & Reading Ry. Co. v. Di Donato*, just decided, *ante*, 327. Here, as there, the employment concerned both kinds of commerce, and was to be exercised as much on one as on the other,—in other words, was as much and as intimately directed to the interstate cars and freight as to the intrastate cars and freight, and that there might have been some duties directed to the latter though there is no evidence of it, is the suggestion of a speculation that has no tangible prompting in the case.

Besides, we cannot accede to the view that there is a presumption that duties performed on a train constituted of interstate and intrastate commerce were performed in the latter commerce. The presumption, indeed, might be the other way. It is to be remembered that it is the declaration of the cases that if there is an element of interstate commerce in a traffic or employment it determines the remedy of the employee. *Second Employers' Liability Cases*, 223 U. S. 1; *New York Central R. R. Co. v. Winfield*, 244 U. S. 147.

Northern Pacific Ry. Co. v. Washington, 222 U. S. 370, 375, declares and illustrates the principle. Expressing the facts and the law applicable to them, it was said, "The train, although moving from one point to another in the State of Washington, was hauling merchandise from points outside of the State destined to points within the State and from points within the State to points in British Columbia. . . . This transportation was interstate commerce, and the train was an interstate train, despite the fact that it may also have been carrying some local freight. In view of the unity and indivisibility of the service of the train crew and the paramount character of the authority of Congress to regulate commerce, the act of Congress was exclusively controlling." *Southern Ry. Co. v. United States*, 222 U. S. 20.

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Syllabus.

It would seem indisputable, therefore, if there be an assertion of the claim or remedy growing out of an occurrence in which there are constituents of interstate commerce, the burden of explanation and avoidance is on him who asserts the claim or remedy, not on the railway company to which it is directed, and there is nothing in *Osborne v. Gray*, 241 U. S. 16, in opposition. Indeed, the court was asked in that case to do what the referee and the Supreme Court in this case have done, that is, to assume to know things of which there is no evidence.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE CLARKE dissents.